Constitutional Conflict
IN
Provincial Massachusetts

A Study of Some Phases of the Opposition Between the Massachusetts Governor and General Court in the Early Eighteenth Century

By
HENRY RUSSELL SPENCER

SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS
FOR THE DEGREE OF DOCTOR OF PHILOSOPHY
IN THE
FACULTY OF POLITICAL SCIENCE
COLUMBIA UNIVERSITY

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CHAPTER I. ANTAGONISTIC COLONIAL IDEALS.

In the constitutional history of Massachusetts there are presented to view three well marked periods of development, separated by revolutions. They may be called the colonial, the provincial and the commonwealth periods, and correspond roughly with the seventeenth, the eighteenth and the nineteenth centuries, respectively. But in its more obvious features, at least, this is not a history of steady progress toward constitutional liberty; rather there are two periods of such development, separated by a third of conscious reaction.

In the first or colonial period we see what claimed to be, and in many respects was, a commonwealth, self-sufficient, dependent on England for sovereignty, but itself assuming the exercise of all sovereign powers. Barely nominal regard was shown for the express commands of the king of England, and the relations held with him were those rather of diplomacy than of colonial subjection. The reason for this was to be found first, in the infancy of the colony, a time when generally the ideas of private founders are allowed free course, in the ideal of a free Calvinistic commonwealth, enjoying complete self-determination in a polity which made the state serve the church; secondly, after the colony had acquired a character, and strength to stand for that character, in the preoccupation of the home government with civil disturbance in England.

With the progress of Charles II's reign, as the purity of the colonial ideal was corrupted and as the home government won leisure to attack its problem of empire, this quasi-independent regime was attacked by foes without and within, a process which reached its climax in what may be called the revolution of 1684-91. The foes without were the English agents of the Restoration policy, such as Randolph and Andros; the foes within were Massachusetts men dissatisfied with the old regime, such as Joseph Dudley and a growing party, who were wearying of the old exclusive Congregationalism and the Puritan morals, or who had commercial aspirations toward larger economic possibilities of the province in trade with the mother country; their co-operation

resulted in 1684 in the annulment of the charter of 1629, the downfall of the old self-government, and the setting up of a provincial government strictly dependent upon England, first in 1685-6, as defined merely in Andros's commission and instructions, then in 1691, elaborated in a charter. What is often called the revolution of April 19, 1689, when the Andros government was overthrown and the old system set on its feet again *de facto* for a brief period, must be regarded as a mere episode in the experimentation toward a satisfactory provincial system. It certainly affected the form of that system, but the real revolution was from colony to province. This was reaction from the Massachusetts point of view, progress from the imperial. The theory of the empire demanded that its members be strictly subordinated to its head, that the home government have its responsible agents in the colonies, to secure co-operation and some degree of uniformity. Hence an independent commonwealth, like the Massachusetts of the seventeenth century, with no means of enforcing the empire's will in the colony, was anomalous and unendurable.

The present study is concerned with some phases of the second or provincial period. The new system was a mixture of two diverse, frequently opposed, sets of institutions, those of the normal British province, and those commonwealth institutions which Massachusetts had developed in her seventeenth-century independence. In the antagonism soon found and developed between them there appeared a constant tendency to reaction toward colonial autonomy, a tendency which was constantly opposed and hampered in its progress by the prerogative elements in the system. The latter had been designed to be predominant, but were obliged perforce to give place more and more to the encroaching popular elements. The provincial system of the first part of the eighteenth century was then a multiform attempt to reconcile actual British sovereignty with considerable practical applications of colonial self-government. But as the century progressed the reconciliation became more and more difficult. The menacing presence of the French on the northern border necessitated during the "half-century of conflict" a conciliatory policy on the part of England, to secure willing co-operation in defence, and this meant that the constitutional issue must be postponed. After the passing of the French peril in 1763 the issue was forced

from home. But in a series of constitutional conflicts between popular and prerogative elements of the system the province had been developing a constitutional opinion, and a sentiment in favor of that opinion: it held that self-government to secure the Massachusetts conception of the rights of Englishmen was indispensable to her welfare and was worth even the sacrifice of the British name, if that should prove necessary; it developed a sentiment that was to prove strong enough even to sustain the shock of a war to make good that opinion.

It is this development of the provincial period that resulted in what is called the American Revolution, whose issue for Massachusetts was a third status, that of the legally as well as actually independent commonwealth, fully self-determining in its policy and conduct, and shortly entering into a union with other commonwealths for the purpose of making more secure the enjoyment of independence and self-government.

It is necessary, first, to examine the two opposing governmental principles whose interaction is the key to the constitutional history of the provincial period. Three-quarters of a century of neglect by the home government had given the infant colony opportunity to develop in its own way, its form determined by the fact of organization as a corporation; but even this form was disregarded when the central purpose of the enterprise demanded the assumption of powers not usual among corporations. Under the guidance of two generations of determined, aristocratic Puritans Massachusetts had become a theocracy, its sovereignty vested in the "freemen" of the Massachusetts Bay Company, whose power was concentrated, with the consent of the church-members, in the hands of the rulers of the Congregational church. This Company, originally organized with an English corporation's powers for trade, land-holding, and colonization, had been transplanted to America, where it became merged in the colony by the admission of the prominent resident colonists to the corporation. It gradually forsook its natural original functions, and became merely a political body, exercising as its chief reason for being the power to "governe and rule,"[1] which had been intended to be merely incidental to the more ordinary powers of colony-planting, land-holding, and trading.

[1] Mass. Col. Records, I. 17.

The Assistants, or governing body of the corporation, began the exercise immediately of executive, more gradually of legislative and judicial, powers. But the first twenty years of the colony's history saw a steady growth of democracy, the generality of the corporation asserting and making good their claim to a share in the government. The result of this conflict was the development of the General Court as the governing body of the colony, composed of two houses, which, taken together, constituted its highest authority and could speak the will of the Massachusetts Bay Company. Massachusetts, in the seventeenth century, was a prophecy of what the Great Britain of the nineteenth century should be, a unified parliamentary system, with all powers of government depending mediately or immediately on the legislature, the General Court, which not only made law and raised money in its legislative capacity, but also elected and superintended the action of the executive, the two departments being in a relation of mutual control and guidance. The church-membership qualification made it far from a democracy resting on the consent of the governed; but to the extent of the church membership, for the political people, it was practically what it sometimes called itself, a commonwealth. It depended on the outside world (even the mother country) for none of its essential powers: it was a self-governing colony of the nineteenth-century type, rather than a province of the eighteenth-century type.

The normal English province of the eighteenth century, on the other hand, suggests the second of the two governmental principles, whose contradiction and conflict was to be the central thread running through Massachusetts provincial history. With the restoration of Charles II came the formulation of the British theory of colonies, that was to be put forth during a century and a half, an essential part of the mercantile system. It regarded the colony as existing primarily for the sake of the mother country, only secondarily for its own as part of that mother country's family. The colony was justifying its existence only if it ministered to the development of the mother country, furnishing raw materials for her manufacture or a market for her products. Commercial interests were dominant, and the theory of government for colonies was evolved with a view to promoting them.

Here, then, is the fundamental idea in the imperial theory of colony government. The province was to exist not primarily for

its own sake, but for the mother country. If, then, England's will, and not that of Massachusetts, was to prevail, the form of government must be adapted to that end. It must be a province and not a commonwealth. The political center of gravity, the right to give sovereign command, must be not within, not the general will of the members, but without, in the sovereign will of England. The expression and execution of that will in and for the colony was most conveniently and effectually performed through a governor. Its constitution was to be like that of the Tudors, a monarch governing the people through his own action and that of agents constituted and controlled by himself; the representative body existing merely to grant the taxes demanded and assent to the laws proposed by the executive body.

This was in general terms the ideal English view of colonies in the later seventeenth century. It never got a complete application in Massachusetts except in the brief administration of Andros, but it must be borne in mind as one of the two rival principles.

The first shock of their opposition in Massachusetts came in the early sixties on the home government's attempt to enforce the acts of trade and to bring about substantial uniformity of law throughout the empire, with the correspondence of Charles II and Massachusetts, and the sending of the royal commission of 1664. With the discovery, as the result of this correspondence and of Randolph's efforts, that these two ends could not be attained under the existing constitution, that the empire had no agents to enforce its will in the colony, that the colony's government was self-sufficient and could afford to be heedless of the home government's suggestions or even commands, obviously the next thing was the removal of the present obstacle, the colony charter, on which rested these claims of autonomy. Wtih the annulment in 1684 of the charter granted in 1629, the colony found itself in the hands of the king, with nothing in law to prevent the complete application to Massachusetts of any colonial theory he should deem fit. Would the state of public opinion in Massachusetts and the force available for the purpose make it practicable for the home government to apply the extreme prerogative theory? The Andros regime was an experiment in this direction. As an imperial official he was given powers nearly absolute, all government to be by himself, assisted by a council named

in England, a body which by the terms of its constitution could be made an instrument entirely in his hands. Legislation and tax-granting should be by this council, as well as the constitution of courts of justice.

The failure of the Andros experiment was immediately due to the collapse in England of the unconstitutional rule of James II, and it is impossible to say whether or not it would have failed in Massachusetts in case James's rule had been accepted by the English people or William had accepted James's colonial theory entire. It seems probable that at least a violent struggle would have been made by Massachusetts against such a regime as permanent, for in spite of Andros's generally mild rule there was very strong opposition in several parts of the colony to the payment of taxes, not as excessive, but as unconstitutional, the general sentiment being one of resentment against Andros for "accepting an illegal commission." Besides the constitutional opposition, Andros found himself in a difficult situation in that he must antagonize the two strongest elements of the population, the ecclesiastical by his attempt to secure religious liberty (for the Anglican church), the property-holding by his declaration of the invalidity of titles which rested on grants by the general court through towns (almost the universal form).

Whether inevitably or not, the Andros experiment failed, and the settlement resulting from the "glorious revolution" was in Massachusetts a compromise between the two principles of government which up to that time received a trial. It was early decided not to attempt to govern Massachusetts in the manner of absolute monarchy; that was probably impossible after what happened at home in 1688. A charter should be granted defining the relation between king and people. But it should not be the old charter, under which practically absolute power had been granted to or assumed by the general court. The new charter of 1691, deriving sovereignty nominally from the king of England, so distributed powers that the exercise of sovereignty was shared between the home government and the organized Massachusetts people. The governor represented the tradition of the Andros absolute government. The general court represented the tradition of colonial self-government. The contrast is not the same thing as the separation of executive from legislative powers, but the two have a close relation. In general terms, which will

receive considerable qualification, we may say that the bodies of government which exercised executive powers represented the provincial element in the system, while the bodies which exercised legislative powers represented the commonwealth element.

The provincial period witnessed the interaction of these two theories and forces. Government, in the last instance, was to be by neither the governor nor the house, but by the two in agreement, one necessarily yielding to the other. The compromise (Pownall's "great question between external and internal principles")[1] whose foundation was laid in the charter, was subjected to modifications as time went on and as doubtful points in the charter received interpretation. These determinations depended somewhat on occasional circumstances, but in a larger way they show a tendency toward the restriction of the charter rights of the king, and the enlargement of the charter powers of the people, a tendency by which the provincial constitution gradually reverted toward the colonial. But the duality of the provincial government was always marked, as compared with the unity of the colonial, and though there were times when, under a native lieutenant-governor or a weak governor, the house became practically the sovereign parliament, controlling executive policy as well as legislative, this was never more than temporary. As soon as the home government realized the situation a new appointment brought its proper agents again into action for the execution of its policy, and the unified parliamentary government gave way to the normal provincial government of balanced governor and house.

The purpose of this study is to portray the agents that were used in carrying out these principles, especially the governor and the house; to study their characteristics as bearing on the general question of their relation to one another; and to follow to their conclusion some of the more important disputes, to find how far the tendency, above hinted at, for the house to gain at the expense of the governor, in the end prevailed. It is believed that such a study is necessary to a proper appreciation of the constitutional position of the respective contestants, when in the middle of the eighteenth century the home government found itself ready to push to an issue the differences of opinion then prevailing regarding its constitutional rights over the colonies. In these contests

[1] Pownall, Administration of the Colonies, ix.

the colony was learning the specific bearings of the difference between prerogative and popular theories of government, was developing the theoretical views which it was to claim and defend as its own, and was educating opinion to a point where the people would fight sooner than give up these constitutional claims; in a word, the whole provincial period was the time when the issues were formulated and the forces were stored up which were to occasion the American Revolution. Or it might be figured as a siege, conducted on the plan of the successive capture of outposts till finally the home government makes a sortie and loses all. But there was no conscious striving after independence. It was the specific privileges that were fought for and won, and independence was the outcome only because by the home government the specific privileges claimed were deemed incompatible with colonial dependence.

CHAPTER II. COMPROMISE IN THE CHARTER.

The charter of 1691 is to be observed from two points of view; first, it was the written constitution of Massachusetts during the provincial period. After what has become, largely under its influence, a characteristically American fashion, it contained a grant of governmental powers, to be exercised in certain prescribed modes, and created a limited system of government, unable to enlarge its own powers, subject to a superior sovereign body which was then the king in parliament, but could readily be changed in 1780 to the people of Massachusetts. The charter may also be regarded as a summing up of the constitutional struggle, the rigid statement in a document of the compromise now arrived at between royal and popular principles. That this rigidity was only relative the provincial period was to show, with its shiftings of checked and balanced powers.

The charter was signed October 7, 1691, the result of several months' negotiation by four agents of the province on the one side, and on the other by the privy council's Committee for Trade and Plantations and Attorney-General Treby. The annulment of the former charter by Charles II and the fall of James II and Andros had conditioned the work of the negotiations in two ways; the independence of the province was done away for good and all, but the experiment of absolutism had proved a failure as well. The committee, having experience of both regimes, was ready now on the basis of the lessons thus learned to establish not what was correct theory, but what was practicable. The agents, moreover, had certain well defined ideals, but were prepared to compromise when necessary. Elisha Cooke and Thomas Oakes, who arrived in England as extra agents in March, 1690, having left Massachusetts when the old charter government re-established under Bradstreet was in operation, were firm for the restoration *de jure* of what had been *de facto* restored. The other two agents, however, Sir Henry Ashurst, an Englishman, and Rev. Increase Mather, who had left Massachusetts when the Andros regime was in full operation, knowing better the condition of opinion in England and the impossibility of a continuance

of the old system, were ready to take what they could get, using the familiar market-place method of claiming everything, but showing a readiness to yield here and there in order to make good their claim to other points.

As a first step, early in 1689 Mather used all his "interest" to prevent William's reappointment of Andros to his place held under James, and upon the news of Andros's fall to prevent the appointment of any successor as general governor of New England. Partly because of the hasty manner in which the old charter had been annulled, partly because of the uncertainty as to the attitude of the new Whig monarchy to the colonial policy of James, the matter was left undetermined till Andros and his subordinates should make known their side of the case, and meanwhile word was sent by the privy council to those who were administering the government in Massachusetts to continue in that service until further orders.[1]

In order to a permanent settlement Mather hoped at first for legislative action. The Convention Parliament, in January of 1690, resolved that the abrogation of charters in the last reign was "illegal and a grievance," and passed a bill through the commons for restoring them. But it was overweighted with vindictive propositions displeasing to the king, and was thrown out by the lords. Upon the dissolution the newly elected parliament was too much under the influence of the reaction against Whig revolution to pass the bill. Therefore the application to the legislature was given up. The defense of Andros and his subordinates against the complaint made (though unsigned) by the agents, and the complaint which Andros and Randolph were able to make good good against Massachusetts in the matter of the acts of trade, their religious exclusiveness and the like, produced a strong sentiment in England against countenancing the revolutionary party in Boston; and the shower of petitions and counter-petitions in 1690, some in favor of the continuance of the conciliar regime, showed that the province was by no means a unit in the desire that the old charter should be restored.[2]

The result of all this was a direct application by the agents to the king, in whose hands the province now rested. The decision

[1] August 12, 1689. Quoted in Palfrey, New England, IV. 25.
[2] Palfrey, IV. 64-7.

of the courts against the charter was not likely to be reversed. Parliament would not restore it. But the king might be prevailed upon to reincorporate his subjects. Accordingly a petition was presented to the king in council with the heads of the charter of the Massachusetts Bay Company and of the proprietary charter to Gorges for the province of Maine (since 1677 the property of the Massachusetts corporation), and the request that their Majesties "re-establish their corporation and grant them their laws and former privileges." In addition to what was contained in the old charter new powers were desired; viz., precise authorization of a representative house, power to tax non-freemen and strangers, power to punish offenders (the right to apply the death penalty being "difficult to make out" of the old charter), admiralty jurisdiction such as had been granted to Gorges for Maine, power to erect probate and chancery courts, to coin money, to settle and raise the militia, and finally a general confirmation of grants of land, together with the pardon of past irregularities. This petition, having been favorably reported on in general terms by the law officers, was referred to the lords of trade. Later they reported that it was necessary for them to know whether it was the king's pleasure "to have a governor or single representative of his own appointment from time to time, to give his consent to all laws and acts of government, as in Barbadoes and other Plantations, Or Whether His Majesty will leave the Power of making Laws wholy to the People and officers to be appointed by them." The king declared his pleasure that there be a governor appointed by himself, and April 30 the privy council ordered that the lords of trade prepare "the draft of a new charter upon that foundation."

The work now proceeded expeditiously, Attorney-General Treby putting the draft into legal form in accordance with the determinations of the lords of trade as to policy, holding frequent consultations with the Massachusetts agents. Mather especially received many marks of their consideration for his opinion and the province's desires, but on matters important to the prerogative his protests, however earnest, were unavailing. Even the attorney-general's proposals in behalf of the province were in some cases overridden by the lords. For example, the governor's veto upon laws and the appointment of the lieutenant-governor from home were omitted by him until insisted upon

by them, though Mather had declared in this very connection that "he would sooner part with his life than consent."[1] On July 30 the draft was reported to the privy council and sent to the king (then with the army on the continent) for his approval, and decision as to two chief points objected to by the agents. They desired that judicial as well as other general officers be elected by the general court, not by the governor and council, and that the governor have no veto upon elections to the council. From the king came word, August 20, that he "did by no means approve of the objections," but "did approve of the minutes agreed unto by the Lords of the Committee." On August 27 the agents presented a petition requesting a number of changes in detail, and two were granted; the "corporal" oath was altered, "that so no snare may be laid before such as scruple swearing on the book;" and a clause was added validating land-titles of the old regime which lacked the public seal. One of the rejected clauses was prophetic of a dispute later to arise. It would have given power to the assembly to constitute agents paid by the province, to "represent their interest at home as well against the governor as otherwise."

The document thus negotiated constituted the province a body politic and corporate, established a frame of government, and distributed governmental powers among the agents thus created. This was a century too early for the charter to contain a list of rights which the subject should enjoy because they were his originally and inalienably. Individual liberty was unprovided for, and the liberties of the people were secured rather in the frame of government and in the political means of defence which were granted, than in any enumeration of rights which might not be infringed by government.

Speaking in general of the frame of government, we must recognize first the continuity between the old and new systems. It is not a case of throwing down one in 1684 and setting up another in 1691. However complete the discretion of the lords of the committee as to the details of the charter, they did not, practically they could not, get away from the fact that the colony had a political past which must be considered the foundation of its future; that it had evolved a system of government which,

[1] C. Mather, Parentator, 134, in Andros Tracts.

though it had lost its legal form in 1684, was still present as a hard political fact, and whose ignoring in essentials would cause friction impossible to overcome. Essentially the new charter meant only the re-establishment of the colony government with certain important modifications in the direction of dependence on England. Eighteenth-century Massachusetts was rather a corporate colony modified toward the province type than a province varying toward the colony type.

But in form the province charter wrought several striking changes. The executive was no longer elective, with power derived from the representative general court. The king was to send over a governor, a lieutenant governor and secretary, commissioned to hold office during his pleasure. The magistrates, constituting both the governor's council and the upper legislative house, had been changed from the assistants, elected by the general court and of practically equal rank and power with the governor, to the council, subject to the governor's veto (a point strenuously resisted by the agents), and distinctly inferior to him in the executive. Its character was thus changed to a minor prerogative body, the leadership of the colony having passed from it to the house. In respect to the house the change wrought by the charter was unimportant practically, but a great gain to the province legally. What had sprung up spontaneously at the demand of the rising spirit of democracy, but with no foundation in the colonial constitution, was now given precise authorization, and the powers and privileges of the house, already long exercised and reduced to custom, were now given express recognition and legality. A judicial system should again be set up by the colonial legislature, but the appointment of judges should now be not by the people or the representative body, but by the governor and council. An important step in the reduction of the colony to its proper provincial status was the charter's guaranty of appeal from colonial courts to the king in council, in personal actions of a certain value, a final denial of the colony's long-maintained claim of jurisdictional self-sufficiency. The questions were now set at rest which had risen as to the legality of the colonial courts and their right to inflict punishments, such functions having rested hitherto upon an extremely loose construction of a corporation's powers. The powers of legislation and finance were now set on a firm founda-

tion of constitutional grant. Law was still to be made by the general court, but the participation of the representative house with the assistants was here expressly provided for. On the other hand, the practically absolute power hitherto enjoyed by the general court was subjected to two very substantial limitations. The governor was no longer a mere presiding officer of the upper house. He received an unqualified veto upon legislative acts of whatever sort, becoming in effect a third house of the legislature. Moreover, acts of the general court must be not repugnant to the laws of England, and were made subject to the disallowance of the king in council, a power that might be exercised at any time within three years, and either for the purpose of cutting off unconstitutional acts or at the imperial discretion. The power of the purse was expressly given to the general court. Hitherto the right to tax had rested only on the power of the corporation to assess its members, and it might well be questioned whether non-freemen, persons not members of the corporation (a category including probably a very large majority of the inhabitants), were subject to its taxation. The executive function of warranting the issue of money from the treasury was given to the governor and council, but there was a possibility of future dispute in the requirement that this issue be according to acts and rules of the general court, while the legislature will be found using this latter power to acquire a right of appropriation, and hence more and more control over administration. The qualification for the exercise of the suffrage had hitherto been membership in the established Congregational church. This was utterly done away by the charter of 1691, and in its place was the requirement of the possession of property, landed or personal. This was the legal expression of what had already become actual, a change of basis in the provincial society from church to wealth. It may well be questioned whether the change meant any substantial widening of the suffrage, but it was significant of the secularizing of Massachusetts, the loss of its peculiar theocratic polity, a step in its assimilation to the normal province.

For many reasons the charter was to be regarded as a gain to the province, giving legal validity to practices found convenient but hitherto having insecure legal foundation. Nevertheless the inclusion of prerogative elements, especially the imperial governor with his negative upon laws and elections, made

it seem very far from the desire of the province. Two of the agents, Cooke and Oakes, steadfastly opposed its acceptance while in England. Mather was brought, though with sincere reluctance,[1] to accept it as the best Massachusetts could hope for from a king more fond of efficiency than of liberty in governments subject to him; and after doing his best to secure its modification according to colonial ideas, accepted the inevitable and endeavored to recommend it to the people of the province. The people themselves were divided in sentiment, but universally saw that resistance was out of the question, and that it was for them to make the most of the privileges that had been granted, in order to win back the substance of powers they had nominally lost. Acceptance was made easier by the first appointments, for they were all made upon Mather's nomination: Governor Phips, a native of Massachusetts, of whose exploits in Nova Scotia she was proud, an intimate and admiring friend of Mather's; Lieutenant-governor Stoughton and Secretary Addington, men who had been prominent in the old colony government, and whose appointment might be expected to gratify the province and make it think that it was enjoying a considerable degree of self-government under provincial forms; the council of twenty-eight, with one exception Massachusetts men,[2] and including all the leading men of the colony except the implacable partisans, Cooke, Oakes, and Danforth, who persistently refused to accept and support the new regime.

The charter in action was the fundamental law of the province, to which every statute must conform or suffer disallowance from home. But superiority was claimed for it not only over colonial acts of government, but over imperial as well. Even a governor's instruction, however late or peremptory in terms, was understood to have no power to compel the provincial governmental bodies, so long as they could base themselves on a charter provision to the contrary.

Under these conditions, as time passed, the provincial charter came to be cherished with something of the reverent regard in which the colonial charter had been held. The threat of its abrogation was a club held over the province throughout the

[1] Palfrey, IV. 82.

[2] Hutchinson, Massachusetts, II. 20, 21, note.

period. From time to time vague intimations were given by the secretary of state or the board of trade that certain misdemeanors of the province would, if continued, be regarded as "worthy the consideration of the legislature," that is, that parliament would take upon itself the altering of the province constitution. However useful as a threat, such action was improbable and almost impracticable, and the threat ceased to have weight. The prerogative bodies, privy council and board of trade, were jealous of the intrusion of parliament into their peculiar field of colonial affairs, and would therefore be very reluctant to call in its aid except as a last resort. Moreover, competing statesmen, who as secretaries of state or opposition leaders would have the responsibility of dealing with the colonies as a party issue, were very reluctant to introduce a matter of such delicacy, which might overturn the balance of parties in unexpected ways. So Walpole in 1729 would be very slow to accede to Newcastle's desire of parliamentary action to settle the salary controversy, lest the issue be made use of for party purposes by his rival.

In 1725 an Explanatory Charter was granted upon the recommendation of the board of trade. Shute's quarrel with the house had revealed two points upon which the charter was ambiguous and upon which the home government was now ready to declare its mind: the governor's right to veto the election of speaker of the house and his right to control the adjournment of the general court. The charter was accepted by the court in formal resolve,[1] but such action was wholly unnecessary for its validity, and only meant the asquiescence of the province in the inevitable, glad to get off with so easy a punishment for its misdeeds.

Such then was the constitution of Massachusetts, legally a grant of governmental powers by the king out of his prerogative, but in the view of the province partaking largely of the nature of a direct constitutional compact between the king and the people of Massachusetts. The people owed allegiance to the king, and would remain his loyal subjects (under their own colonial legislature and local self-government) so long as his part of the compact was fulfilled, viz., the protection of the people and the preservation to them of their liberties as Englishmen. It was the attempt

[1] 1725-26, c. 467, Acts and Resolves of the Province of Massachusetts Bay, X. 738.

to ignore this direct constitutional relation between king and Massachusetts people, the attempt to reduce Massachusetts to the condition of a mere dependency, the exercise of the sovereign power of the British parliament to break the Massachusetts charter in 1774, that brought on a revolution. Massachusetts took up arms in 1775, not to win new powers, but to resist the encroachments of parliament upon what the province had come to regard as her constitution, and the system to which she resorted in the interregnum of war, the constitution which she set up in revolution to fight for and defend was the system set forth in the charter of 1691.

CHAPTER III. THE PREROGATIVE BODIES.

The provincial governor must be viewed in his twofold capacity of head of the province and agent of the home government. Under the old charter the governor had derived all his power from the colony, and had bestowed practically all his efforts upon the service of its interests. The home government had then lacked an efficient agent for the execution of its will, and the purpose of curing this defect had been the chief reason for the changing of the system, from the old charter to the new; hence the character of the new governor's office is especially worthy of study.

But these two differing, and sometimes opposed, aspects of the governor's office will not be studied separately. Rather, they must be borne in mind together as constant conditions of the problem, while the governorship is studied as an institution of government, in its own make-up and in its relation with other institutions. Occasions arose when the governor as head of the province had a different motive and policy from the governor as agent of the home government, when the interests of colony and empire apparently clashed. For the outcome of this conflict it must be observed at once that, while in form and functions the governor appeared primarily as the head of the province, yet by reason of the source of his power and the means by which he was controlled he was primarily the agent of the empire. Governmental authority for the province was derived through his commission from the king and hence he became the proximate source of all that made for the prerogative interest in the province, both official and political, the source of office and the nucleating center of the prerogative party. From yet another point of view, he was the king's representative, his viceroy, standing presumptively above parties for the unity of the province in its imperial relations.

The most striking change from the old system to the new was the mode of appointment of the governor. No longer subject to annual election by the people whom he was to govern, he depended upon the commission of the king, continued during

pleasure. He must have constant regard to the interests of a power outside the province, which had made and might unmake him. The oaths by which he was bound were framed accordingly. Besides the oath of office, he must take those of allegiance and supremacy, binding him to the Protestant succession in England, and yet another, relating to the enforcement of the acts of parliament touching the colonies, especially the acts of navigation and trade.[1]

Besides the formal grant of power through the commission, the governor received instructions[2] as to its use, which were prepared by the board of trade and authorized by the privy council. At each appointment a full set of instructions was issued, a quasi-constitution, defining the limits within which the prerogative might not be encroached upon, outlining the policy which the home government desired the governor to pursue upon matters in controversy. These instructions did not vary much between administrations, except that they showed a constant tendency to grow in number and definiteness.[3] Additional instructions were issued as occasion arose, prescribing the governor's course of action upon special matters either of imperial administration or of colonial legislation. The instructions were regarded as of force only between the two parties giving and receiving, the home government and its agent. The governor might be instructed to insist upon the assembly's establishing a salary, but the assembly was regarded as within its rights in refusing, however much the governor might expostulate against their presumption in refusing the king's express wish. As to the governor's own obedience, it rested largely with his official conscience. Of neglect in an important matter he was likely to be admonished

[1] Greene, Provincial Governor, 55, 68.

[2] Greene, 93-96.

[3] Phips received 36, Bellomont 44, Dudley 73, Burgess 78, etc. A collection of the commissions and instructions to Massachusetts governors is being prepared for publication by the Colonial Society of Massachusetts. By the kindness of Mr. Henry H. Edes, Treasurer of the Society, the writer has had the opportunity of examining the printer's copy, and it is to this forthcoming work, which will constitute Volume II of the Society's Publications, that reference must be made for that whole body of sources, not hitherto in print, with the single exception of Dudley's instructions, in Mass. Hist. Soc. Collections, Series 3, Volume IX.

by the secretary of state or the board of trade, but the only means of compelling obedience was a threat of recall and of the loss of royal favor, a force which was sufficient to determine in general the policy of the ambitious appointee, but which necessarily allowed him considerable uncontrolled freedom of obedience or disobedience in less important matters.

More informally, the will of the home government was communicated to the governor through the letters of the secretary of state and board of trade. He was instructed to keep them minutely informed of all that concerned the execution of his commission, the purpose of the colonial legislation sent home for approval, and his opinion as to its fitness for royal confirmation. The volume and usefulness of this correspondence varied with the personality of the incumbent. Bellomont was an indefatigable man of business, and his letters were numerous and full of information. Shute, at the other extreme, was much complained of for his neglect of correspondence, leaving important acts of government, the home authorities complained, to be reported to them by the public prints,[1] and sending letters only at long intervals. Belcher's letters were numerous and long, but unsatisfactory for administrative purposes, being filled principally with jealous strictures on fellow officials and with the urging of his own claims to royal favor.[2]

Theoretically the governor, as an expert on colonial conditions, and the board of trade, with its wider view of imperial interests and its information on conditions in other colonies, were, through intimate and frequent correspondence, to concert and execute a policy which was adapted to the service of both colony and empire, to secure a degree of unity among the members of the latter, and of uniformity in their procedures. Only in a slight measure was this end attained, for there were great difficulties in the way of a complete understanding. The lack of a system for training officials for colonial service at home and abroad, and the thorough grip of the spoils principle on the system of appointment, made the personnel unsatisfactory in point of efficiency. The diminishing influence and significance of the board of trade, and the official ignorance and carelessness in reference to colonial affairs, exemplified in the Duke of Newcastle as secretary of state, were

[1] Chalmers, Revolt of the Colonies, II. 26.

[2] Many are printed in Mass. Hist. Soc. Collections, Series 6, Vol. VI.

combined with the physical obstacles to communication arising from great distance and irregular despatch service, to make imperial control of the empire's servant in the colony less and less efficient. The result was a growing predominance in the governor of what was designed to be his minor characteristic, that of servant of the province. The tightening of the reins during and after Halifax's administration of colonial affairs came too late to counteract this tendency, and it is not without significance that the time of this change is very nearly coincident with that of more energetic colonial resistance to dictation from England, which led shortly to the Revolution.

The governor had important relations with legislation and with the administration of justice, as well as the executive duties that were more peculiarly characteristic of the office. His right to convene, adjourn, and dissolve the general court occasioned disputes with the house, which are more conveniently treated in the following chapter. But the governor also had positive influence on legislation, both direct and indirect. He was accustomed to send messages to the house on all manner of occasions, urging legislation upon specific matters, showing particulars in pending legislation to which he should refuse consent. Moreover, at the beginning of each session and on other important occasions he would summon the house to the council chamber and make an address to the joint assembly, summarizing the military situation if it were a time of war, imparting information, especially letters from the home government or other colonies, recommending certain matters for their consideration, (frequently the "low" condition of the treasury, or the "distressing" state of the currency), with a view to legislation,— as it were a speech from the throne. These speeches were at first informal. For example, Stoughton on one occasion directed the attendance of the house in the council chamber and recommended to their consideration the "public state of the province," touching the war, the lack of money in the treasury, the expiration of certain acts which should be continued.[1] After Bellomont's arrival the procedure became more formal; the governor gave his speech in writing to the house after deliv-

[1] Court Records, VI. 450. This is the name used to designate the manuscript records of the council, when acting in its legislative capacity.

ery, and received their formal answer.[1] Its influence on their action was little more than that of a president's message of the present day to a Congress having an opposition majority. On party issues his recommendations were ignored, on other matters an insistent public opinion could obtain concurrent action by governor and house.

The governor's indirect influence on legislation was probably considerable, varying with his personality. He presided in council in both legislative and executive sessions, and his proper constitutional domination in the council, when sitting in its executive capacity, must have given his opinions great weight with the same body when legislating. Bellomont and Dudley assumed a position of leadership in the council's legislative deliberations; Bellomont concerning himself in debates, proposing bills and other business, preventing their action in his absence except as a committee of the whole; Dudley forcing business to suit himself and dominating men of weaker will.[2] This right of interference in council was claimed and exercised by the governors throughout the provincial period, notwithstanding an adverse opinion delivered by the law officers of the crown.[3]

By charter an absolute veto was conferred upon the governor, upon all acts of the general court, whether legislative or elective. Hence we may regard him as not only influencing the upper house, but as constituting by himself a third house of the legislature. The use of this veto was not sparing, but was infrequent because unnecessary. Non-concurrence by council, under the governor's influence, of objectionable measures of the house, sifted legislation very thoroughly, and the resulting number of actual refusals of consent is surprisingly small, considering the frequent differences of opinion. There was a considerable body of possible legislation to which the board of trade instructed the governor to refuse his consent, and the expectation of that veto undoubtedly prevented the useless passage of repugnant measures.[4] The time during which the governor might consider bills was not fixed in the charter or instructions. As the veto was not a suspensive one, to be overridden by an extraordinary major-

[1] E. g., Feb. 14, 1701. Court Records, VII. 144.

[2] Sewall's Diary, 5 Mass. Hist. Soc. Collections, VII. 47.

[3] Chalmers, Opinions, 238.

[4] E. g., Court Records, VII. 415.

ity, the importance of the time of the veto appears in the possibility that the house could compel the attachment of his signature to favorite measures by withholding his allowance. They were accustomed to put off the consideration of such allowance until the last day or two of the session, when presumably the legislative and elective acts of the assembly had been completed by the governor's signature, which was usually affixed shortly after the concurrence by the council. The house tried to establish the principle that signatures should always precede allowance, but vigorous protest was made by the governor, with final success. In the salary settlement of 1735 it was agreed that his allowance should be granted at the beginning of the session.

As Greene has pointed out for the provinces in general,[1] the powers of the governor which brought him into connection with the judiciary, were of three sorts. By the charter he was to constitute courts of justice, and to appoint judges, while by statute he was given some judicial functions to perform. But as to the extent of these powers Massachusetts differed from other provinces. The power to erect courts was exercised by the general court, which by a series of statutes[2] (after repeated disallowance and modified repassage) established a system of common law courts, and in this establishment the governor participated merely as one branch of the legislature. A chancery court, however, being peculiarly for the exercise of the king's superjudicial prerogative, was not allowed to be set up by the colonial legislature. Several attempts were made to give equity jurisdiction to the governor (or chancellor appointed by the governor) and eight of the council,[3] later to three commissioners appointed by the governor and council;[4] but these acts were disallowed, Attorney-general Northey being of opinion that the queen could set up an equity court in Massachusetts, but the general court could not do so by the terms of the charter.[5] Phobate jurisdiction, on appeal from the county probate judges, was given by statute[6] to the governor and council. Further statutory juris-

[1] Greene, Provincial Governor, Chapter VII.
[2] Act 1692–3, c. 33; 1697, c. 9; 1699–0, cc. 1, 2, 3, 4; 1701-2, cc. 5, 6, 7.
[3] Act 1692–3, c. 33, § 14.
[4] Act 1693-4, c. 12.
[5] Chalmers, Opinions, 195.
[6] Act 1696, c. 8.

diction of the same body was over cases of marriage and divorce,[1] cases of embezzlement by regimental officers, with power to impose fines and to imprison,[2] and cases of creditors' petitions, with power to issue commissions of bankruptcy.[3] Admiralty jurisdiction was supervised by the governor through his special commission as vice-admiral, though after 1702 the vice-admiralty court was held by a judge appointed by the crown.

But the appointing and commissioning of judicial officers was the chief function which brought the governor into connection with judicial affairs. Here, as in most of his executive functions, he was controlled by the advice and consent of the council. It was the settled policy of the home government that judicial offices in the colonies should be held not on good behavior but during pleasure.[4] Tenure of office was generally permanent, removals being very rare. As all commissions became inoperative upon a demise of the crown, and as it not infrequently happened that the new sovereign sent a new governor, there was considerable opportunity for executive policy to impress itself upon the judiciary by appointment, without the abuse of arbitrary removals. Belcher was the only governor with a bad name on this account. He maintained that the change of governor had the same effect in terminating commissions as the change of sovereigns, and took the opportunity to make sweeping changes in the personnel of the judiciary to serve his own purposes, but this example was not followed by later governors.[5]

But the most characteristic functions of the governor were executive. Besides his duty in general to see to the enforcement of the law, all governmental matters which were not regulated by legislation were for the governor and council to attend to. The description of this field was accomplished mostly in the charter, by the withdrawal of certain things from the competence of the legislature, to an extent also through the delegation of func-

[1] Act 1692-3, c. 25.

[2] Act 1701–2, c. 14.

[3] Act 1713–4, c. 14.

[4] Greene, Provincial Governor, 134–6.

[5] Shirley attempted it, but readily gave up the point upon the refusal of the council to join. Hutchinson, II. 336, note.

tions by the legislature, and also by the imposition of duties from without. The provincial period saw the legislature gradually encroaching upon this field, attempting either to transfer a function from the governor to itself, or to control him in its exercise.

The administrative powers of the governor were of the sort which was customary in that office.[1] The appointment of civil officers by the executive was far less extensive in Massachusetts than in other provinces, however, for the charter secured to the general court the right to select all except those pertaining to the courts,[2] an exception which the legislature confined as narrowly as possible, as the following chapter will show. But even when thus limited, the exercise of the appointing power seemed likely at first to fall into the hands of the council, the popular part of the executive. Under Phips[3] and Stoughton the council assumed the right to elect even the above mentioned judicial officers, leaving to the governor only the right of confirmation or refusal. With the coming of Bellomont, however, this error was corrected and the initiative was reassumed by the governor.[4] Bellomont and all subsequent governors named the officers, and the function of the council was reduced to the evident intention of the charter, mere acceptance or rejection.

One of the chief sources of the governor's power in administration, as described in the charter, was his right to order the issue of money from the treasury. The claim of the house to a primal and superior control over the issue of warrants is so important for the constitutional relations of governor and house that a separate chapter is devoted to its discussion.

By statute, miscellaneous administrative functions were bestowed upon the governor, to be exercised with the advice and consent of the council, principally in the form of licensing the performance of certain acts which needed administrative control, e. g., the erection of wooden buildings within the Boston

[1] Greene, Chapter VI.

[2] "Judges Commissioners of Oyer and Terminer Sheriffs Provosts Marshalls Justices of the Peace and other Officers to Our Councill and Courts of Justice belonging." Acts and Resolves, I. 12.

[3] Executive Council Records, II. 206.

[4] Executive Council Records, III. 41.

fire limits,[1] the carrying on of trade with the Eastern Indians,[2] the removal of inhabitants from the frontier towns in time of war.[3] The court was also inclined, especially in the early part of the period, to use the governor and council for other purposes, such as the appointment of impost commissioners,[4] and truck-masters for the Indian trade,[5] but it later preferred to perform such functions directly.

The issuance of ordinances, a quasi-legislative power, was necessarily in the hands of the governor and council, to be used in cases of emergency, as supplementary to legislation by the general court. It was also used by special grant in advance by the court, but very slightly, and less and less as time went on. The court was inclined to do by itself all the legislating that needed to be done, leaving as little as possible to the dreaded executive. The right to issue proclamations belonged, of course, to the executive, but it was a question how far the exercise of that power could be controlled by the court. Fasts and thanksgivings were proclaimed by the governor by the advice and consent of the council, usually at the express desire of the house. Indeed, during the first eight years such days were set apart by regular legislative resolve, originated by the house, concurred in by the council, consented to by the governor. But after 1701 this irregularity was avoided until 1721, when, in the midst of the controversy with Shute, the representatives (March 16) ordered a committee to join with a committee of the council in preparing a proclamation for a fast day. The council, in its legislative capacity, non-concurred, and declared that such participation by the house was contrary to precedent. In its executive capacity the board had prepared a proclamation which it declared, "will be communicated to the House." But the representatives insisted on actively participating, saying "that if appointment of such days has not the sanction of the Court, persons are not liable to be punished if they work or travell thereon, which will tend to a great disorder."[6] The council

[1] Act 1692-3, c. 13.
[2] Act 1713-4, c. 13.
[3] Act 1694-5, c. 25.
[4] Act 1692-3, c. 5.
[5] Act 1699, c. 13.
[6] Court Records, XI. 115.

again supported its position by argument, and announced that the governor, with the advice of the council "and at the instance of the House," had ordered proclamation of a fast. The house protested that it had "made no such instance, but voted a committee to join with a committee of the Honorable Board to prepare the draft of such a proclamation." But in spite of this protest the proclamation was issued as an executive act. In June of the same year the house voted that "13 July be appointed as a day" of fasting, "and that His Excellency be desired to issue out a proclamation accordingly," an evidence that the house had given up its claim. The assumption of the house figured in Shute's complaints to the home government, and the law officers of the crown, as might have been expected, declared that the house had no right to participate in the governor's function of issuing proclamations.

Together with these miscellaneous administrative duties of the governor as executive head of the province may be mentioned a few that came to him as the imperial agent. He was instructed to urge certain matters of policy upon the assembly, acting, as it were, in the capacity of imperial adviser in legislation. He was also made responsible in a general way for the execution in his colony of the parliamentary acts of trade and navigation. Beginning with the administration of Bellomont, he was instructed that forfeiture of office and other marks of the king's displeasure would be the consequence of failure to observe these acts, so far as was due to his wilful fault or neglect. All officers of the admiralty and customs therefore were to receive from him due encouragement.[1] He was to watch over the king's interest in forest trees that were fit for masting the royal navy.[2] Other instructions[3] requiring him to transmit a census of planters, of inhabitants, slaves, etc., and a yearly account of their increase and of the number fit to bear arms, together with a particular account of the defences of the province, illustrate the function of the governor as the home government's general source of information.

The governor was military head of the province. It was by him that militia officers were appointed and commissioned,

[1] Bellomont's 43d instruction.

[2] Bellomont's additional instruction of Jan. 19, 1700-1.

[3] Dudley's 39th and 60th instructions.

and the militia commanded. In time of war, with a regular military force in existence, whether raised by impressment of militia or by voluntary enlistment, the governor was commander-in-chief, with power to build fortifications, to impress men and ships and other property, to administer military law by commissioning courts martial, and, most important, to direct military operations. Here he was free from the control of the council, except as to the commissioning of courts martial. In all these matters, however, his nominal legal freedom of discretion was subject to qualifications. How far the need of money to carry on military operations necessitated co-operation of the tax-granting body, and consequently subjected him to its dictation, is so large a matter as to require treatment in a special chapter. The navy of the province was a very slight affair, usually no more than a galley or snow, but it also was under the governor's command, as was the royal war-ship stationed at Boston, though the subordination was not clearly recognized in the latter case, and friction easily resulted, as in the case of Phips and Captain Short of the Rose frigate.[1]

Charged with these various functions, legislative, judicial, administrative and military, the governor was subject to limitations and checks from various quarters. In practically all his functions which were not military, the governor's action required the advice and consent of the council, a body in whose constitution popular election played a large part. By his veto the governor could exclude therefrom men who were personally or politically obnoxious, but having no initiative in its appointment he could not secure the aid of men whom he desired, if they were displeasing to the house. Naturally the council tended to become a colorless body, without positive influence on the governor's action, but providing a conservative force which would keep him from unpopular extremes.

The chief positive force which acted on the governor was the home government, on which he depended for appointment and continuance in office. Through his commissions and instructions and the more informal communications of the secretary of state and the board of trade he was constantly in receipt of their suggestions and commands, positive and negative. The chief nega-

[1] Palfrey, IV. 147.

tive force which operated on the governor, so as to limit his opportunity and capacity to follow the positive pressure from home was the house. As will be seen in chapters V, VI, and VII, the hold of the house upon the province purse-string meant that in divers ways they were able to win a considerable measure of control over his action in the performance of his peculiar functions, legislative and financial, and even administrative and military. The governor's actual course of conduct was the resultant of all these forces, positive and negative, and varied with the degree of pressure applied from home or from the house.

The governor's personal character also was of influence in determining the strength of resistance or of co-operative force he could offer against outside pressure. The situation demanded an almost impossible combination of qualities. In the first place, under the spoils system of appointment, a certain amount of "interest" with the great ones about the court must be possessed by an individual before he could be considered as a candidate for the governorship. This was likely to mean either that he was an ex-soldier whose services could thus be rewarded in a cheap currency, like Phips or Burgess or Shute,— and here there was little likelihood of his possessing the qualities of a successful administrator; or that he was a courtier, skilled in the arts of flattery and self-promotion, perhaps with political morals not stern, but easily adaptable, like Belcher, and in a less degree Dudley. Massachusetts, however, suffered far less than other provinces from the spoils system. Not a single one of her governors played the role of a plundering proconsul to her pecuniary loss, and her two ex-soldiers, Phips and Shute,[1] were faithful to their duty, according to their blundering comprehension of it. Belcher and Dudley were self-seeking in their ambitions, but both were Massachusetts men, and tried to serve themselves through serving, not "disserving," the province.

Two qualities must be sought among those who had sufficient "interest" to be regarded as candidates,— efficiency and amiability. The governor should be an able man, to conduct the administrative and military affairs of the province successfully, to keep the province true to its allegiance and dependence on the

[1] Burgess soon after appointment sold his commission for a thousand pounds, and never came to Massachusetts.

crown, and turn Massachusetts to some account to England in trade or as a producer of raw materials for her manufacture; and he must be resolute to thwart the attempts of the house to encroach on the prerogative, preserving the dual nature of the government, with the governor as a branch co-ordinate with the house. But at the same time he should be personally or politically agreeable to the province, in order that their willing co-operation might be secured in defence, that their natural tendency to encroach on the office might be checked by personal regard or respect for the incumbent, that something positive might be obtained from them in legislation, in conformity with imperial desires of uniformity and efficiency in administration among the various provinces. Four of the ten men appointed governor were natives of the province — Phips, Dudley, Belcher and Hutchinson — and Shirley had identified himself with it by a residence of ten years. Including his term and the time that lieutenant-governors were acting governors, the province was under the command of a Massachusetts man about sixty out of the eighty-two years of the period. True, the politics and not the nativity of the governor was the essential thing, and the native-born governors encountered more hostility on the average than the foreign, their prerogative principles adding an element of grieved disappointment to the popular dislike of the governor *qua* governor. But still the appointment of a native was a sign that the home government desired to secure able service by men who presumably would know the conditions and have at heart the real interests of the province, upon the understanding that the real interests of the province required its close dependence upon England.

Of the Englishmen sent over, Bellomont was a liberal, who took the popular side in the Leisler controversy in New York; and while in Massachusetts he identified himself with the Puritan party.[1] Moreover, his social position flattered the province's sense of importance. Shute was a Dissenter, brother of Lord Barrington, and therefore acceptable to the province, as was Burnet for being son of the famous bishop.

The degree of efficiency secured in the Massachusetts governors was at least as great as was the average among the provinces. Bellomont and Shirley were distinct successes, and without

[1] Hutchinson, II. 106-7.

doubt Burnet would have given the province an administration satisfactory to all concerned had he not been forced by the circumstances of precisely that time to come to a deadlock with the general court on the salary question. Each one of these three had previous administrative experience, Bellomont at home and in New York, Burnet in New York, Shirley as naval officer in Boston. Dudley, as former ally of Andros and as supporter of the prerogative his father would have opposed, was disagreeable to the people, and utterly failed in two or three policies which he urged the court to accept; but he made an excellent reputation in civil and military administration. He had served as president of the Council of New England in 1686, as chief justice in New York, and later as lieutenant-governor of the Isle of Wight; but apparently he always held before his eyes the governorship of his native Massachusetts as the position which he most desired. Belcher's "servile and flattering tone to those above him . . . his arbitrary manner to those under him,"[1] both used for the purpose of winning for himself place and power, had no good results for the province or for the empire; therefore he can hardly be called a success, especially considering his willingness to compromise the salary question, which during his administration was settled adversely to the contention of the home government; nevertheless he did win a victory for the prerogative upon the claim of the house absolutely to control issues from the treasury. Phips, by reason of ignorance and lack of self-control, and Shute, for lack of tact and patience and resolution, must both be accounted failures, though in neither case was there lack of good intention to serve the empire and incidentally the province. Shute was unfortunate in winning the cordial enmity of Elisha Cooke, for several years the unquestioned leader of the popular party; thus, in his case, a personal spite was added to the political struggle, and Shute's administration saw nearly all the constitutional disputes raised and intermingled, and little progress made in settling or disentangling them. The ill-success of Pownall and Bernard in dealing with the questions which arose in their administrations belongs rather to revolutionary history than to this study of the province; and Hutchinson also, while admirably equipped for the position as administrator, came at a time when

[1] C. C. Smith, in 6 Mass. Hist. Soc. Collections, VI. xxii.

the peaceful adjustment of differences was no longer possible, and when the situation demanded a man of force.

The governor's council may properly be described among prerogative bodies, though its attitude was somewhat variable, as will be seen in the accounts of the salary and treasury controversies. It sat at times as a legislative body, combining with the house and governor to form the general court; at other times as an executive body, advising and consenting to the governor's executive acts. But what made it a peculiar institution was its elective character. Not appointed by the king on nomination by the governors, as in most provinces, the council in Massachusetts was constituted through annual election by the general court; this as all other acts of that body being subject to the governor's veto. The election was by joint ballot held on the last Wednesday in May, by a court composed of the council of the past year and the newly elected house. The procedure in the election was regulated by province law. The charter of 1691 named the council for the first year, Mather having the privilege of making out the list; but thereafter by charter provision eighteen of the twenty-eight members were to be inhabitants or proprietors of land in what had been the Massachusetts Bay Colony, four in the old Plymouth Colony, three in what had been the Province of Maine, and one in the territory called Sagadahoc, to the east of the Kennebec river. The remaining two were elected "at large," usually from the old Bay Colony. The election was at first from a double list, nominated apparently by informal ballot;[1] but from Sewall's reference to the election of 1695 — "voted but for eighteen at first"[2] — it would appear that nomination of a double list was soon dispensed with. This was natural, considering that the election was usually a mere re-election of the former council, and a double list would be inconvenient and useless. An attempt by the house in 1703 to require a majority vote for every councillor, was thwarted by Dudley's veto. The governor's power of vetoing councillors-elect was used but sparingly. Only one was rejected during the first ten years. Dudley, it is true, at his first opportunity in 1703, rejected five, and at other times evidenced in this way the opinion

[1] Acts and Resolves, VII. 15.

[2] Sewall's Diary, I. 406.

which he expressed in a letter home, September 15, 1705: "It is every day more apparent that nothing will proceed well here till her Majesty will please to name her own council, the best men in the province can have no share in the civil government till then."[1] But in all the first forty years of the provincial period there were only twenty-four cases of veto on council election, and five of these were on Elisha Cooke and six on Nathaniel Byfield on various occasions. These men were repeatedly chosen by the assembly and rejected by the governor, for what was from one point of view patriotic opposition, from the other factious obstruction.

If the governor could veto a patriot, the succeeding house could drop a prerogative man; yet the house was very moderate in its exercise of this political control. For example, after the stubborn contest between the two houses on the salary question, the house dropped only four of the preceding council, which was no great change in a body numbering twenty-eight. Yet this was the most striking case until the revolutionary time.

The influences of the governor and house would combine to keep in the council men of moderate opinions and to exclude extremists. Inevitably this moderation, which enabled one to keep in office between the two fires, must have degenerated in some cases into insignificance. Yet on the whole this body contained a good proportion of the substantial men of the province, men whose wealth and powers of judgment gave them weight in the community. The council became the conservative body, the buffer between the contending governor and house. Unless special offence was given to the one or the other, the councillor was fairly sure of a permanent tenure of office. Emoluments were inconsiderable. The five shillings a day,[2] (after 1726, ten shillings),[3] was only paid during the session of the general court; the councillor's executive services were unpaid. But he enjoyed exemption from certain burdens of private citizens, such as the poll tax,[4] and training.[5]

[1] Palfrey, IV. 255.
[2] Acts and Resolves, I. 100.
[3] Ibid, II. 406.
[4] Act 1692-3, c. 4.
[5] Act 1693–4, c. 3. § 12.

Membership in the council was not regarded as incompatible with the holding of judicial or executive office. Not to speak of military officers, of whom there were always several in the council, special commissioners for various executive purposes — commissary, diplomatic, and financial — were frequently members of the council; also many of the judges of the superior and inferior courts. The governor was always present in council meetings, both executive and legislative. It was a question whether the other two crown officers — lieutenant-governor and secretary — were not *ex officio* members of the council and entitled to vote. Hutchinson[1] cites a minute[2] of the board of trade, adopted just before the charter passed the seals, to prove that such was the intention of the home government. Such also was the practice in the old regime before 1686. Accordingly, during the first year of the charter Lieutenant-governor Stoughton sat and voted in council, though not named a councillor. But in 1693 the assembly chose to prepare for the possible exclusion of future lieutenant-governors or secretaries who might be obnoxious, and proceeded to elect the then incumbents of those offices to the council. Accordingly, it was supposed to be by virtue of their election and not *ex officio* that Stoughton and Addington long served in council. Stoughton's successors — Povey, Tailer, and Dummer — were accustomed to attend the council, but did not vote except in those years in which they had also been elected. Phipps, the lieutenant-governor in 1730, was forbidden by Belcher even to sit in the council unless elected. In 1767 Lieutenant-governor Hutchinson, hitherto active in council by virtue of repeated election, was dropped out by the house. In the second session of that year the house made formal protest against his being allowed to act or even sit in council, and they won their point.[3]

The functions of the council need little description. It shared the executive functions of the governor, and the legislative of the house. As a part of the executive, it was a miniature privy council. Most of the governor's non-military acts required their "advice and consent," a passive function in which they had no initiative. They were expected only to prevent the governor from making an inex-

[1] Hutchinson, III. 174.

[2] Trade Journal, August 20, 1691, Lieutenant-Governor to have first place in the council "and at all times to have a vote there."

[3] Hutchinson, III. 175.

pedient use of his discretionary powers, or from unconstitutional stretches of them. This sort of business was miscellaneous and very various; for besides the ordinary functions of appointing civil officers, warranting the issue of money from the treasury, and executing functions created by legislative act, it was to include the meeting of emergencies, the performance of all acts of government not otherwise provided for.

The council might do executive business at any time, at any meeting called by the governor, with the charter restriction that special notice seven days previous must be given when judicial officers were to be appointed. Such were called "general council" meetings, but had no other special power or importance. A quorum of seven was required by charter, but the average attendance was twice that number, except during recesses of the general court, when the members from Boston and vicinity were the main reliance for forming a quorum. The usual place of meeting was the "council chamber" in the Boston Town House, but the governor might call it whatever he chose, e. g., at his own house, or infrequently in other parts of the province when the public business took him away from Boston. Its organization as an executive body was under the governor as chairman and the province secretary as clerk. It made frequent use of committees to expedite business, standing committees on war and debentures, occasional committees on other matters that arose.

In case of the incapacity, by death or otherwise, of both governor and lieutenant-governor, it was provided by charter that the council should be the executive, to "have full power and authority . . . to do and execute all and every such acts, matters and things which the said governor . . . could lawfully do."[1] On March 15, 1701, Governor Bellomont died, and Lieutenant-governor Stoughton, on July 7. For eleven months, till Dudley's arrival in June, 1702, the council was the chief executive. Wait Winthrop presided, though not the senior member, but all documents requiring the governor's signature were signed by at least fifteen (a majority) of the council; that is, neither its senior member nor its president, but the council itself in its corporate capacity, was administering the government. It was a time of quiet, and no important occurrences tested the efficiency

[1] Acts and Resolves, I. 19.

of this system. But in 1707 a general instruction was issued by the queen that in such cases the senior councillor should be chief executive. Nevertheless, in a similar case in 1715, it was the council as a whole that assumed the government, regarding the province charter as superior even to the later general instruction. The interregnum was short (February 4 to March 21) and had been caused by a mere accident — the loss at sea of the new commissions necessitated by the demise of the crown. For controlling the council in such cases, provision was made in the instruction[1] that "the said council shall forbear to pass any acts but what are immediately necessary for the peace and welfare of our said province without our particular order for that purpose."

The legislative power of the council was theoretically equal with that of the house. Its concurrence was necessary to the validity of any act or vote of the general court. It will be seen below that in matters financial the house claimed a pre-eminent power, attempting to push the council down into the position of the house of lords; denied an initiative and confined to consenting or rejecting. Moreover, since councillors could be rejected by a subsequent house, they were individually careful not to oppose popular measures too strongly or to become too manifestly identified with the prerogative interest. For this reason the council was politically weaker than the house. On most matters short of a constitutional issue, however, the two houses stood on an equal footing. Moreover, this inclination to yield to the house was largely overcome by the governor's presence in the council, presiding or taking part in debate. Dependent on the house for election, they were also dependent on the governor for confirmation, and the nearer influence was the more powerful. Greater experience in public affairs gave weight to the contribution of the council to legislation, especially in the framing of laws and the provision of administrative details. Many important measures were even originated in the council and concurred in by the house, or were framed by a joint committee of the two houses. Now and then, from differences between them, an utter deadlock ensued, especially in the days of Shute and Burnet, or a bill was passed through all its stages in one house and was voted down in the other; but more frequently, after one or two readings in

[1] e. g., Dudley's, 3 Mass. Hist. Soc. Collections, IX. 115.

one house, it would be introduced in the other. Messages would pass from one house to the other, offering amendments, insisting on clauses. Usually a compromise of differences was thus effected, often by conference committees, occasionally by conference between the two houses.

The governor's council then was a very different thing from the board of assistants which it superseded, notwithstanding their superficial resemblances as upper house, executive council, and judicial tribunal. The significance of the assistants as the depositary of the peculiar Massachusetts tradition had passed by a gradual but inevitable transition to the house. The change in the suffrage qualification based political power upon property, not church membership, and it was the propertied people in their representative house, not the allied clergy and magistrates speaking with authority through a board of assistants, that was to guide the destinies of Massachusetts. This tendency was increased by the partial absorption of the council by the prerogative interest, which necessarily separated it as a body from the political mind of Massachusetts, in the eighteenth-century conflict of the two opposing principles. From the colonial point of view it degenerated in two respects. It lost to the house its character of a representative of the Massachusetts tradition, becoming a mere "other house," unprogressive, opposed to constitutional progress; it had also gone over to the enemy, supporting the governor, urging obedience to the instructions of the home government. From the imperial point of view it was a convenient instrument for introducing a prerogative element into the legislature of the province; but its elective mode of constitution much diminished its usefulness, made it weak in opposing the house and vacillating in its support of the governor.

CHAPTER IV. THE POPULAR HOUSE.

Massachusetts possessed an advantage over many of the provinces, in that she did not have to evolve a representative body to counteract the prerogative elements in her constitution. Long before the crown had a governor there, the province had a representative house. The conflict which came was not in the characteristic English form of popular encroachment, gradual and tentative, upon the crown, but in the form of an invasion, by the governor acting for the crown, of the popular monopoly of governmental power, an invasion that was met by a resistance which combined all the strength of Massachusetts seventeenth-century tradition and precedent with the inevitably growing idea of self-government.

At the time of the planting of the colony, legislative functions, as well as administrative and judicial, were performed by the assistants; the great ones of the community, essentially an aristocratic body, though dependent upon popular election.[1] During the first five years, however, after Watertown had made its protest against taxation for purposes to which it had given no consent, we see the development of a new body, whose peculiar function it should be to represent the towns individually, which should speak the mind of the people of the colony, while the assistants were the voice of the Massachusetts Bay Company. It is true, the identity of company and colony was the essential fact of the Massachusetts colonial constitution, but so far as there were two separate ideas, company and colony, each had its character emphasized in one of the two bodies whose combined action as the general court was that of Massachusetts. Beginning as a mere occasional body of conferees or town committees for advising the assistants and assenting to taxation, it came soon to permanent self-consciousness as a house, co-ordinate with the board of assistants in legislation and finance, exercising some control over even the judicial and administrative discretion of the assistants.

[1] Osgood, The American Colonies, I. 167.

Under the old charter to some degree, and yet more under the new, the house of deputies, or representatives, was the seat of the country party, of radicalism (or, at least, of progress) as opposed to the conservatism of the council; of democracy against the aristocracy of property and intellect there embodied. But more important politically was the change wrought by the charter of 1691 in the character of the latter body — from the magistrates of the corporation to the governor's council. However far the council actually was from the prerogative body it was designed to be, that very design necessitated the assumption by the house of the important function for which the council would now be regarded as incapacitated,— that of representing the popular will against the encroachments of royalty. The peculiar ecclesiastico-political tradition of Massachusetts, as received from the fathers and to be continued to future generations, the tradition of a self-determined church-state polity, the Calvinistic commonwealth, must from now on be preserved by the house, since the imperialized council was no longer fit to bear that responsibility; the importance of the house was thereby very considerably enhanced.

By the charter provision of checks and balances the house was made dependent in a number of respects upon the royal governor. It was upon his summons alone that a house could meet. This function could be exercised by him at his discretion, so that he could at all times make use of the advice and assistance in government of the representatives of the people. On the other hand, he might not dispense with their meeting, nor keep a favorable house in long-continued existence by mere prorogation; for the charter required annual elections. As to their privileges while meeting, they appear at first to have supposed these to be dependent upon the governor's will; for on June 8, 1692, the house presented its speaker to him and asked the customary privileges of freedom of debate, access to the governor, freedom from arrest, "which they expected as their due," and which Phips freely granted them.[1] But this was never again asked of the governor; presumably it was not after this regarded as dependent on his will.

[1] Court Records, VI. 223.

The power of dissolving the house was unquestionably in the governor, to be exercised by word of mouth in the presence of the assembly, or more frequently by proclamation. It must be used every April to make room for a newly elected house. Obviously dissolution was a means by which the governor could get rid of a refractory house, and as such it was sometimes used, e. g., by Shute in 1720 and 1721. But this was infrequent, for the reason that the public business would necessitate a new election, and hence the governor could gain by such action only in case the house did not possess the confidence of the electorate. As elections were annual, this was unlikely, and the chance was that dissolution would help rather than hinder the opposition, as tending to increase the exasperation of house and people against the governor.

The power of adjourning the general court was given to the governor without limitation of time and place. In both of these respects encroachment was attempted by the house in its desire to have absolute control of its own action. As a matter of course each house adjourned itself from day to day and over Sunday, by the governor's tacit consent. On a very few occasions the house attempted to stretch this power. For example, in 1693 the house adjourned from Friday, the 17th of November, to Tuesday, the 21st, many of its members being necessarily engaged in committee work. Of this Governor Phips manifested his resentment as "an intrenchment on the king's prerogative" and the governor's power.[1] The representatives sent a committee on the 21st "to acknowledge their mistake in attempting an adjournment of their house without his Excellency's consent and craved his pardon, declaring that they should be cautious for future of any such practice." Much the same thing happened under Shute in 1721, when, because of a Fast Day intervening on Thursday and owing to the inconvenience of returning to business for Friday only, the house presumed to adjourn itself from Wednesday, July 12, to the following Tuesday. Shute rebuked them when they came together again, reminding them of the precedent from Phips's time, showing them the council's unanimous opinion of the irregularity of their conduct. "I am sensible you have been amused by some sort of men as if this adjourn-

[1] Court Records, VI. 309.

ment were a branch of your privileges and liberties and so ought not to be parted with, but sure no just or thinking man that reads the constitution of this government as granted by the charter can be of that opinion."[1] After some evasion the house was brought to the still somewhat equivocal declaration, on July 20, that they "do entirely confess and acknowledge that by royal charter Your Excellency the Governor for the time being have the sole power and authority to adjourn prorogue and dissolve the General Court and the House further acknowledge that Your Excellency ought to have been acquainted with the design and intention of the House . . . before they did so adjourn, and that it was then so designed, but was casually omitted;"[2] as if the governor's power were only over the court as a whole, not excluding the supposed right of the house to adjourn itself. He dissolved the court in anger. This whole question was set at rest by the explanatory charter of 1725, in the following terms: Whereas by the charter of 1691 "no power is granted" to the house "to adjourn themselves for any time whatsoever . . . it shall and may be lawful to and for the Representatives . . . to adjourn themselves from day to day (and if occasion shall require) for the space of two days but not for any longer time . . . without leave from the Governor first had and obtained."[3]

The further question arose whether the governor's power of adjournment included the determination of the place of meeting, obviously a matter touching more nearly the convenience and freedom of the house; for removal might be not only for hygienic reasons, to escape contagion, but also for political reasons, to harrass the house into action or remove them from the influence of a certain community. Now all details of the manner in which the governor should exercise his right of summons were determined by a law of the province, for want of charter provision or executive assumption of that regulation, and in the law establishing the form for the writs of election, the town house at Boston was mentioned as the place of meeting. Here were kept the province records, and custom regarded it as the capital of the province. Upon this basis the house made its claim against Dudley in 1702, Shute in 1721, and Burnet in 1728-9, and in a

[1] Court Records, XI. 195.
[2] Ibid, 198.
[3] Acts and Resolves, I. 23.

more notable case against Hutchinson in 1770, that Boston was the only legal place of meeting, and hence any change, for example to escape the small-pox epidemics, which were not infrequent there, required an act of the legislature of equal formality with the original act — a pure denial of the governor's right. That act of 1693, however, showed on its face, as the governors were not slow to point out, that the writ in the act was signed by "I. A." (the initials of the then secretary), that it was issued by the sheriff of Suffolk County, and was addressed only to the selectmen of Boston, and that therefore "those words in the writ" (establishing the Boston town house as the place of meeting) "were mere form and like other words in it *exempli gratia* only." The strength of the position of the house, we must therefore conclude, was not in law, but rather in the custom of the province in favor of Boston, which ought to be broken only for some extraordinary reason, and then by the legislature.

In August of 1721 the house and council passed a vote to which the governor refused his consent: Resolved, on account of the small-pox raging in Boston, "that the present Great and General Court or Assembly be removed to Cambridge . . . to such time as His Excellency thinks fit." Shute expressed himself as willing to grant the removal by executive act at the request of the court, but said, "It will be giving up the King's prerogative to consent to the adjournment in the form it was sent up." Neither the governor nor the house would yield, and therefore the session quickly came to an end. The court was summoned to meet for its next session at Cambridge. At once the governor announced "that the present method for removing the court from Boston should not be made a precedent," and "that he should be willing that the court should take any proper method to make valid the meeting of the court here, if it were doubted to be regular and legal."[1] This the house apparently regarded as a complete surrender to its contention. The result was the following resolve: "That the Great and General Court or assembly, Shall and may be Now held at Cambridge, . . . and that No Exception or advantage shall be taken hereby Respecting the power of Removing the General Court from place to place."[2] Nevertheless

[1] Court Records, XI. 240.

[2] Acts and Resolves, X. 120.

Hutchinson says[1] that, "by this equivocal vote the governor imagined that he had preserved his authority entire." Upon the general reference to the law officers of the crown concerning matters in dispute between Shute and the house, an order in council was passed in conformity with their opinion, "that the sole power of . . . . adjourning the General Court . . . . either as to the time or place is in His Majesty's Governor." The explanatory charter made no mention of this matter.

In 1728 the governor's exercise of his right was opposed with more reason. Burnet, exasperated by the sympathy of the Boston people with the refusal by the representatives to establish a salary, and especially by a resolution to that effect passed in town-meeting, removed the court to Salem, frankly avowing his reason,[2] hoping that they would now manifest a better temper, and be more obedient to the instruction. The representatives in an injured tone declared that they should carry their sentiments and reasons with them wherever they should be obliged to meet. Apparently they admitted the governor's power to remove; for, while declaring immediately that they conceive the court cannot without its consent be removed, yet, lest advantage be taken of their non-appearance, reserving to the province the benefit of the law fixing the place, they "do not refuse meeting His Excellency at the time and place aforementioned," i. e., at Salem. Again they conceded the governor's right in their earnest request that he "remove the court to Boston." But two weeks later, after attending to miscellaneous business, they made their formal protest. They believed that the act establishing writ-forms required the assembly to be at Boston and could be changed only by the legislature. They made much of the fact that Shute in 1721 had consented to a legislative resolve validating the proceedings at Cambridge. Burnet made complete answer to their protest, and of necessity they proceeded to business. In hearings, before the board of trade, of matters in dispute between Burnet and the house, the Massachusetts agents represented the adjournment to Salem as unreasonable and a hardship, "using his power in a very absolute way," but did not charge it with illegality.[3] In the following session, August, 1729, Burnet had the satisfaction of reading to the court

[1] Hutchinson, III. 300.

[2] Court Records, XIV. 183–7.

[3] Palfrey, IV. 519, note.

the report of the board of trade, approved by the privy council, that the question of adjournment had been determined previously in favor of Shute, and that the present governor's action had been agreeable to that determination.[1] The matter had been argued in Massachusetts in April, the council this time entirely upholding the governor's contention against the house.[2] In the same month the governor adjourned the court to Cambridge, where it was sitting when his death put an end to their disputes. The governor certainly had legal right on his side, but considering the breach of custom and the inconvenience to the house of meeting in any other place than Boston, it should have required an extraordinary occasion to justify the use of that right. Moreover, the use of it with Burnet's motive would seem to have been the height of unwisdom, since it only increased the exasperation of the house, already sufficiently opposed to granting a salary, to be harrassed from place to place to bend it to his will.

It was this body of precedents then to which Lieutenant-governor Hutchinson and the house could refer in 1770, when the question came up once more on his calling the assembly at Cambridge instead of Boston. Their refusal to do business, the new argument of the house against removal (viz., that it was based on an unconstitutional instruction) when used in connection with the old ones revived, and the different outcome in this revolutionary time,[3] are anomalous circumstances not to be treated in this account of the workings of the provincial system. It is only necessary to remark that here is another instance of the preparation which the provincial period was making for the revolutionary, setting against each other the antagonistic elements in the constitution, and developing their respective attack and defence.

The form of the popular representative body had not to be evolved by a process of experiment or adaptation, but was found ready to hand. The house of deputies of the colonial period became the provincial house of representatives, an experienced body, with customs and traditions of its own, whose power was hardly at all weakened by the Andros interregnum, when the lack of a representative house was simply part of a regime which was regarded as wholly unconstitutional.

[1] Court Records, XIV. 264.
[2] Court Records, XIV. 233-6.
[3] Hutchinson, III. 282-300.

One of the most striking innovations of the new charter, in appearance at least, was the change in the suffrage qualification. The church membership test was abandoned, and in its place was substituted a property qualification, the familiar forty-shilling freehold of the county members of parliament, or the possession of other estate of the value of fifty pounds.[1] The original suggestion of the board of trade had been a property requirement of one hundred pounds, which was modified to fifty after a conference between the attorney-general and the agents, a concession to democracy. The new qualification shifted the balance of forces. It did not perhaps involve a very great widening of the suffrage, though the forty-shilling freehold was a fairly low limit for a community of small farmers of relatively equal economic position; but the change was important in that it shifted the basis of participation in things political from the spiritual to the economic domain. It was a plain sign that the Calvinistic commonwealth had become an English province, its peculiarity as a people had vanished, its community and sympathy with other English colonies was recognized, a change fraught with great significance for the latter part of the eighteenth century.

For eligibility to the house the charter required only that the representative be a freeholder. The requirement of residence in the constituency, destined to become so characteristic of the American representative system, came in only by statute, and then it would seem almost by accident, to serve a temporary purpose. Governor Phips found himself opposed by a knot of Boston men in the house, who represented distant towns which could ill afford the expense of sending men from home. To get rid of this opposition Phips urged the passage of an act[2] requiring that the representatives be freeholders "and resident" in the towns for which they stood. This is subject here to the usual criticism that it meant a loss of strength to the house, since the frontier communities were far less able than the metropolis to produce statesmanship. The interests of the community represented were relatively

[1] The editor of the Province Laws has shown the error, by which the word "forty" was substituted for "fifty" in the duplicate of the charter sent to America, an error repeated in many later reprints of the charter. Acts and Resolves, I. 363.

[2] Act 1693–4, c. 14.

of less consequence than those of the colony as a whole, and hence there was less need of accurate local acquaintance with the constituency. However, this system resulted in making the house a more truly representative body. The mingling of men from all parts of the province, the exchange of views, the reaction upon all parts of the province of the doings and deliberations of the house, meant much in the preparation for a time when the correspondence between constituents and their members at the center was suddenly to blossom into a system of Committees of Correspondence, which could disseminate ideas rapidly throughout the province and produce simultaneous co-operative action, counteracting the otherwise excessive localism of the towns and producing a provincial community of sentiment. The house of the eighteenth century was a really representative body, in a sense inapplicable to the house of the seventeenth century, or to the commons. Representation was based on economic standing in the community, not on church membership; and while the latter had originally meant the solid, reliable elements of the community, in a degenerate time it was running the risk of involving hypocrisy and fraud, and was coming to mean priestly domination of an undesirable sort. The influence of aristocratic nomination and actual corruption, which so strongly affected the commons of the eighteenth century, was not to be found on this side of the Atlantic. With all its crudeness and ignorance of political science and of the principles of legislation, with all its pettiness and faction in dealing with the policy of the home government, the Massachusetts house was at least truly representative, speaking the mind of its principals.

The unit of representation in the house was the town. Since 1639 each town had been entitled to two delegates, and this general plan was continued in the charter of 1691, with power in the general court to make apportionment. There was substantial equality between the towns; but some regard was paid to proportion in the provision by which every town of 40 or more electors must send one representative, of 120 or more might send two, of 30 to 40 might or might not send one at its option; while towns with less than 30 electors might join with other towns in choosing and supporting a representative. Exception was made of Boston, which as the metropolis might have four representatives. The custom was for every house to be composed of four

from Boston and one each from seventy or eighty other towns (a growing number), with two representatives each from three or four of the large coast towns, as Salem, Ipswich, and Newbury. These delegates were elected in open town-meeting, and represented the towns in their corporate capacity. Yet they together formed a provincial legislature, based on the people of the province as a whole and capable of expressing its unified will; that is, they were not mere delegates confined as to opinion and powers to the instructions from their towns.

The house was the sole judge of its membership. The representatives might "settle order and purge"[1] their house and "make necessary orders for the due regulation thereof." They expelled a member in 1715 for scandalous immoralities, and at times excluded military officers.[2] Fines were imposed for unexcused nonattendance, and the house journal is full of requests by individual representatives that they be excused absence on such and such days for specified reasons. By such procedure the quorum of forty was made easy to obtain. The charter required the taking of the oaths of William and Mary which were substituted for the Allegiance and Supremacy Oaths, and the Declaration against transubstantiation. Privilege from suit or arrest during the session and during necessary journeying was enjoyed by the representatives; also exemption from military service, constable service, and the watch. Since their pay came ultimately from the town represented, economy was a motive with some towns for slighting the duty of electing a deputy, at a time when the towns were so poor as to feel the burden, and before political agitation had made representation a privilege to be coveted and used to the fullest extent. Pay was set at three shillings per diem during the time of attendance and necessary journeying,[3] but was later changed as the currency depreciated to four shillings,[4] six shillings,[5] and to two shillings new tenor.[6] It was paid from the province treasury and then assessed upon the province tax due from the town. This practice of making the pay of the representative automatic and

[1] Act 1692-3, c. 38.

[2] E. g., Moodey, a "commander of soldiers in pay," July, 1720.

[3] Act 1692–3, c. 38.

[4] Act 1714, c. 4.

[5] Act 1726-7, c. 13.

[6] Act 1737-8, c. 3.

impersonal was precisely what the governor demanded for his own support, and Burnet in 1729 did not omit to call the attention of the house to its inconsistency in refusing a salary to the governor "for the time being. In fact, Burnet withheld his signature for a time from the warrants for the representatives' pay, in the vain attempt to compel favorable action by them.[1] The result of this protest was the assimilation of the two wage systems, but not in the method desired by Burnet. From now on, after the manner of the governor's support, the amount of the daily wages of a representative was fixed annually by act of the general court.[2]

The organization of the house, with the one exception of the speakership, was exclusively subject to its own action. Its clerks and messengers were elected by it alone, though paid by semi-annual resolves of the whole court. It made great use of committees, to prepare business and formulate policy. The germ of a standing committee system is in the Committee on Petitions, appointed every session to receive and report on pecuniary claims against the province, on muster rolls and expense bills of all sorts. There was usually a committee whose business it was to see what laws were about to expire and needed reviving, and what amendments were needed in the law of the province. But besides these standing committees there were many others which were purely occasional, e. g., to deliberate on the governor's messages and draft replies; also a series of quasi-administrative committees, to make special inquiries, or to care for the execution of some command of the house, e. g., purchase or examination of stores or fortifications, burning bills of credit, and the like. An examination of the composition of these committees reveals the fact that a very few leading men were called upon by the house to ascertain and state its mind on many different kinds of business, indeed, after the manner of a cabinet, to form its policy. During the administration of Shute, when the speaker forsook his former attitude of impartial moderator, that officer was very frequently a member (often chairman) of the committees appointed to represent the house in its differences with council and governor. In fact he seems to have developed the position of "leader of the house."

[1] Court Records, XIV. 239.

[2] Acts 1730-1, c. 15; 1731-2, c. 12, etc. Yet this was occasionally omitted, e. g., 1732-3, 1740-1, and regularly omitted after 1748.

It was this possible leadership that gave significance to the question whether or not the governor might veto the choice of the house for its speaker. The charter was silent on the point, and during the first ten years there seems to have been no suggestion of such a right. The house would merely send a message to the governor, informing him whom they had chosen. Bellomont[1] "expressed his satisfaction" with their choice, but that was as near as any of these early speakers came to actual approval by the governor. Dudley, however, proceeded to claim a right analogous to that of the Crown over the commons. In 1702[2] and also in the two following years he "declared his acceptance" of the speaker chosen by the house. In 1705 the choice of the house fell upon Thomas Oakes, who as agent in England had opposed the new charter. Dudley described him to the board of trade[3] as "a known commonwealth's man, never quiet nor satisfied with the government, but particularly very poor;" and, as Chalmers says, he "disliked the government of England."[4] Dudley declared to the messengers of the house "that he did not accept the election" and "by virtue of the power granted him by Her Majesty's royal commission directed that the House proceed to the choice of a new Speaker." The house insisted on their choice, standing on the act of 1693, already confirmed in England, which provided that the house might "settle order and purge their house and make such necessary orders for the due regulation thereof as they shall see occasion." It paid no heed to his suggestion that they elect another man with a *salvo jure,* but proceeded, as if already fully organized, to the election of councillors, the necessary business of the day. The exigencies of defence absolutely required a good understanding between executive and legislature, and Dudley dared not assume the responsibility of arresting public business by insisting at that time on his claim of right. On appealing to the council he received their opinion, that "it is not in the governor's power to refuse the election of a Speaker and direct the choice of another by virtue of the charter." Thereupon he abandoned the contention and announced the next day that, though "he is very well satisfied of Her Majesty's just

[1] Court Records, VII. 70.
[2] Court Records, VII. 361.
[3] Palfrey, IV. 295.
[4] Chalmers, Revolt, I. 332.

right and prerogative to allow or disallow a Speaker," as well as the council, "being all elected by the Assembly," yet he yielded, owing to the pressing demands of the war, "saving to her most gracious Majesty her just rights."[1] Oakes was again elected in 1706, but no record appears of the approbation of the governor. From now on the house was accustomed to send a message "to acquaint" the governor with its choice, "which His Excellency (usually) declared was acceptable to him."[2]

In 1720 the house chose for speaker Elisha Cooke, who had prominently identified himself with the popular opposition to the king's reservation of mast timber, and in several ways had made himself very obnoxious to Governor Shute. Upon the formal notification to the governor, "His Excellency answered that the said Elisha Cooke had treated him ill who is the King's Governor and therefore by virtue of the power given to him by the royal charter he does negative the said Elisha Cooke, and desires the House to proceed to the choice of a new Speaker." The house replied that they "do according to their known and legal privileges insist on their choice." As it seemed likely that the house would regard itself as organized and proceed to the election of councillors, and would do so alone unless the council were allowed to join it, the governor withdrew, but directed the secretary to acquaint the house: "That he is informed Governor Dudley did in his government disallow of a Speaker chosen by the House and that his proceedings herein were approved by the Commissioners of Trade and Plantations, and that it would not be thought fit that His Majesty's right of having a negative upon the choice of a Speaker be given up, which was reserved to His Majesty as well by the charter as by the constitution of England." After the election of councillors Shute made a speech warning the house of the unacceptableness in England of their choice of one who had ill treated the king's governor, for whose removal from the council he had received the thanks of the board of trade. He strongly urged them to choose another speaker with a reservation of their rights, and to send home for an explanation of that part of the charter. The house, after due deliberation, voted upon the question, "Whether they shall

[1] Court Records, VIII. 114, ff.

[2] E. g., 1707. Court Records, VIII. 294.

proceed to the choice of a new Speaker?" and "it passed in the negative nemine contradicente." Next day the governor dissolved the assembly, expressing the hope that the new one to be elected would choose for speaker "one that fears God and honors the King."[1] The speaker elected by the new house was Timothy Lindal, a choice which the governor declared "was very acceptable to him." They did indeed yield as to the person of their choice, lest business be longer impeded; but they still insisted on their rights, declaring that the assertion and maintenance by the former house of their right and ancient privilege of choosing their speaker and not owning his Excellency's power to veto, "was nothing but what they were strictly obliged to."

In 1721 the second house (elected on the early dissolution of the regularly elected one) met August 23, and soon sent word to Shute that they had elected John Clark, "and that he had accordingly taken the chair." The governor replied, "I accept of the choice of John Clark, Esq., as Speaker of the House of Representatives." But the house voted that, while they had sent word "to acquaint His Excellency and the Honorable Board with the choice of their Speaker it was done for their information and not for His Excellency's approbation." Shute replied the next day that the board of trade had informed him of their conviction, based on the opinion of the attorney-general, that the governor has "a full power to non-concur in the choice of a Speaker and in all elections."[2] As the house continued of the same opinion as before, Shute urged them to state their case and send it home for determination.[3] This was done, and in a general inquiry regarding points in dispute between Shute and the house this question was settled. The law officers of the crown declared that under the charter of 1691 the right of the governor to veto was an open question, the speaker being an officer not of the general court but of the house; hence, while Shute's action was proper, the right being one enjoyed by the king against the commons, yet the action of the house was not a contempt. An explanatory charter was accordingly issued August 26, 1725, in which express power was given the governor to approve or dis-

[1] Court Records, XI. 3–6.
[2] Ibid, XI. 201, 203.
[3] Ibid, 222.

approve the choice of the house.[1] From 1722 to 1725, inclusive,[2] the house had been merely announcing to the lieutenant-governor that such an one had been elected speaker "and is now sitting in the chair." But after 1726 it was the custom for the house to send a committee presenting their appointee to the governor "for his approbation," and for the governor to send a message in writing approving of their choice.[3]

Powers belonged to the house solely as a branch of the general court, in which its acts must have the concurrence of the council and the consent of the governor. They rested on the express grant by the sovereign in the charter, and may be classified as elective, financial, and legislative.

It was by the general court[4] that the council was annually elected, and all other officers not judicial, including the province treasurer, war commissioners, excise commissioners for the province or separate counties, commissioners for other financial functions, such as audit, and the granting of debentures; also agents to treat with other colonies or with the Indian tribes. It became a disputed question between the appointing governor and council and the electing general court, whether the attorney-general and public notaries were "officers belonging to the courts of justice," and whether or not the house might participate in their election. Until the close of Dudley's administration it was supposed that the attorney-general was such an officer, and he was therefore appointed; but in 1716 Lieutenant-governor Tailer allowed an election to that office,[5] by the general court. Shute and Dummer acquiesced in the custom, though Dummer dutifully communicated to the house a paragraph in Shute's letter of March 21, 1724, "proposing that a just regard be had to the opinion of Attorney-General Raymond" (in England) against the election of this officer by the court. But the council readily joined with the house in electing rather than appointing, and, though on this occasion Dummer vetoed the election, he consented to their later attempts of the same sort, 1725-8.[6] Burnet came instructed to

[1] Acts and Resolves, I. 22.
[2] E. g., Court Records, XII. 169.
[3] E. g., 1726, Court Records, XIII. 125.
[4] Acts and Resolves, I. 12, 16.
[5] Court Records, X. 61.
[6] Court Records, XII. 197–202, 378; XIII. 181, 324; XIV. 76.

signify to the general court that his Majesty conceived this nomination to be the undoubted right of the governor; hence he was "not to suffer any person to act in that station but such as shall be nominated by" himself. This time (June, 1729) the council sustained him, and unanimously rejected the proposition of the house to make a joint election as hitherto.[1] The office was this time filled by the governor and council through appointment. In vain did the representatives protest, declaring it a privilege "which has been transmitted to them by their predecessors" and which they "ought not to forgo."[2] Again, in November and December, 1729, the house made an elaborate and ingenious argument for what they claimed as a right.[3] They even requested the grand juries to pay no regard to bills presented by an attorney-general "whose authority was unconstitutional as it wanted their concurrence." But the council made complete answer to the claim of the house, basing their claim as they safely could, on the governor's peremptory instruction, and that point was lost by the house.[4]

Notaries had derived their authority from the Archbishop of Canterbury, but in July of 1720 the house began to include them among the public officers who should be elected by the court. As the council did not accept the invitation of the house to a joint ballot to elect notaries, the house proceeded to elect them by its own votes. When the time came for their being sworn, the governor naturally said, as the council had not participated in the election "he did not see how they could be sworn."[5] At the November session of the same year, however, the council was brought to concurrence,[6] and thereafter appointment of these officers was made by the general court.

Hutchinson regarded this method of choosing public officers by joint vote as a defect in the constitution, since the council was less than one-third as numerous as the house, and hence had comparatively little weight except when the house was divided upon candidates. But, remarking that if the election were to be

[1] Court Records, XIV. 244.
[2] Ibid, 247.
[3] Ibid, 335-9.
[4] Ibid, XIV. 346-9.
[5] Hutchinson, II. 216.
[6] Court Records, XI. 22-30, 47, 49.

concurrent instead of joint, the right of nomination would be overpowering,[1] he did not suggest which house should have that power. The joint ballot by the general court seems to have been a conservative approach to popular election of these subordinate executive officers, the council exerting a regulative force in that choice.

The taxing and appropriating power was bestowed by the charter in the following words: the general court may "impose and levy proportionable and reasonable assessments rates and taxes upon the estates and persons of all and every the proprietors and inhabitants" of the province; this money to be issued from the treasury upon orders by the governor and council for defence and support of the government "according to such acts as are or shall be in force within our said Province."[2] The manner in which these powers were exercised, the degree to which the house excluded the council from conference or power to amend, the expansion by the house of its power of control till it amounted to minute regulation, are reserved for description in a separate chapter.

The legislative power[3] was granted to the general court with nearly complete discretion in its exercise. It might "make ordain and establish all manner of wholesome and reasonable Orders Laws Statutes and ordinances directions and instructions either with penalties or without (soe as the same be not repugnant or contrary to the laws of this our realm of England) as they shall judge to be for the good and welfare of our said Province or territory and for the good and ordering thereof and of the people inhabiting or who shall inhabit the same and for the necessary support and defence of the government thereof." Some degree of formality was developed in the procedure of legislation, every act requiring three readings to pass to engrossment and enactment, the bills passing from one house to the other between readings, conferences by committee or by joint assembly accommodating differences as they arose. But a number of practices in legislation arose which seemed undesirable to the home authorities, and which the governors were instructed to prevent. The first to attract attention was the placing a time limit on the

[1] Hutchinson, II. 298.

[2] Acts and Resolves, I. 16.

[3] Acts and Resolves, I. 15.

operation of acts. For reasons that will appear more plainly in the discussion of financial and military control, the general court was accustomed to limit to one year (or other definite short period) the duration of the tax and impost acts,[1] also a whole body of legislation corresponding to the mutiny act at home, providing for the levy and discipline of soldiers,[2] the transportation of them out of the province, the offering of scalp bounties. Moreover, other acts more or less experimental in character, e. g. offering bounties on hemp and flax,[3] regulating hawkers,[4] swine,[5] the poor,[6] or granting monopolies,[7] were passed for a period of three or five years, then perhaps renewed or allowed to lapse, in some cases made perpetual. Very likely there would have been no objection to this as mere legislative practice, but the home authorities feared that the character of temporariness given to legislation which was absolutely necessary to the executive, was merely a cover for the requirement of frequent submission of essentially permanent laws to legislative action, in order to give the house leverage upon the governor. This was undoubtedly the case with the fiscal and military laws. Furthermore, it was supposed that laws which were displeasing to the home government might escape disallowance by being made temporary and hence scarcely worth disallowing, so that the court might pass these laws, give them effect for a limited period, and then pass them again. This procedure was scarcely at all used, and in the long run ill effects in any particular case could be avoided by instruction to the governor to use his veto. But it was apparently feared; for Bellomont received an additional instruction[8] that all laws for the support of the province, except temporary laws having their effect within a certain time, were to be made perpetual, and no act was to be re-enacted "except upon very urgent occasions but in no case more than once without His Majesty's express consent."

[1] Acts 1692-3, cc. 4, 5.
[2] Acts 1697, cc. 1, 2, 5, 12, 13, 14.
[3] Act 1701-2, c. 13.
[4] Act 1710-1, c. 13.
[5] Act 1713-4, c. 16.
[6] Act 1703-4, c. 14.
[7] Act 1728-9, c. 17.
[8] February 3, 1698-9; incorporated into the regular instructions of later governors, e. g., Dudley's, 3 Mass. Hist. Soc. Coll., IX. 105.

Less important constitutionally was the early practice of joining several matters in one act which had little or no relation to each other, and of making their continuation or supplementation in later acts merely by reference to their titles, which caused much confusion in the law of the province as understood in England, especially as the facilities for the transmission of laws were very imperfect, and the law officers of the crown sometimes found themselves called upon to advise as to the expediency of allowing an act which merely referred by title to a number of former acts, perhaps not perfectly consistent. This was the occasion of the instruction informally intimated to Stoughton, given in due form to Dudley[1] and later governors, that independent subjects of legislation be not embraced within the same act, and that no clauses be inserted relating to matters not referred to in the title; and of a later instruction (the 12th in the set issued to Burgess) that no act be suspended, altered or repealed by general words, but only by express mention. A further attempt at regulating the legislation of the general court was an instruction, appearing first as Burgess's 14th and continued thereafter, that no act "of unusual and extraordinary nature wherein our prerogative or the property of our subjects may be prejudiced" be passed without the royal pleasure previously signified, or a clause suspending its operation till the royal pleasure be known. Its terms were too indefinite, however, to be a very effective regulation of the court's legislative power.

Another power granted to the general court was that to "make or pass any grant of lands lying within the bounds of" what had been the colonies of Massachusetts Bay, Plymouth, and Maine. This naturally belonged to the court as representative of the corporate personality of the province, which had succeeded to the ownership of the property of the Massachusetts Bay Company, but it is worth noticing in contrast with the governor's power in some provinces to grant public lands, an opportunity for fraud not always neglected. Accordingly it was the general court that granted authority for surveys in the public lands, held hearings of objectors to the grants, and finally passed title to individuals or to companies of persons thereby incorporated as towns.

[1] 3 Mass. Hist. Soc. Coll., IX. 103.

The judicial power of the general court was contained in the right given it to "erect and constitute judicatories and courts of record or other courts . . . for the hearing, trying and determining of all manner of crimes . . . causes and things." With the imperfect separation of powers in the old regime the general court had done a good deal of judicial business itself. This part of its functions was done away with by the new charter, (though not by express provision), the legislature confined itself to legislative work, and judicial work was done by a complete system of courts created by the legislature, with a superior court for the final hearing of appeals from the local courts, saving an appeal in some cases to the king in council.[1] The general court heard no cases, but occasionally on petition and hearing passed a private act granting retrial or such other special relief as the case required.

A unique case was that of John Borland and others in 1706, involving six prominent Boston merchants who were accused of furnishing supplies to the enemy in Nova Scotia. Even Governor Dudley was accused by rumor of complicity, to the extent at least of connivance at breaches of the law, and intense political excitement prevailed. By committee the house expressed to the council its request, that such proceedings, examinations, trials and judgments may be had and used upon and relating to the said persons as is agreeable to law and justice."[2] Hutchinson remarks: "It was expected that the council would proceed as the House of Lords do upon an impeachment. No wonder the council did not immediately proceed. In trying a capital offence it behooved them to be well satisfied of their jurisdiction."[3] The house, either convinced that that proceeding was irregular, or fearing that the charge of high treason could not be supported, proceeded to pass private bills of pains and penalties, declaring in each case the guilt of the subject of the bill and sentencing him to the payment of a considerable fine. The whole proceeding was nullified shortly after by the disallowance of these private bills by the privy council, and its order for the repayment of the fines.

The political complexion of the house has been several times hinted at. It was at all times the seat of opposition to the preroga-

[1] Acts and Resolves, I. 15.
[2] Court Records, VIII. 208.
[3] Hutchinson, II. 142.

tive, with a greater or less degree of unanimity on different occasions. The ports, especially Boston, furnished leaders for this party, who were followed in opposition by the members from the country towns. It was the radical, or at least progressive, rather than the conservative, commercial classes, of the port towns who held this position of leadership. Such men as Dr. Elisha Cooke and his son, were able, by appeal to popular prejudice against outside (i. e., home government) interference, to win a following and weld it into a fairly compact party, which they used, generally for the patriotic purpose of checking executive excesses, but sometimes apparently in a factious spirit, to serve a private pique or hamper the governor in the legitimate and politically expedient exercise of his powers.

The port towns were less fond of rotation in office than the country, more inclined to send the same representatives to successive general courts and thereby win experience and influence. In the thirty-five elections from 1693 to 1725, Charlestown, for example, sent individuals as her representatives for an average of 3.8 terms each, and one of her representatives served sixteen terms. Shute complained of a maxim in Boston, "A negatived councillor" (therefore a man obnoxious to the governor) "makes a good representative," and it was a fact that three of the Boston delegation in 1723 had at various times been excluded from the council by the governor. Shute regarded the house generally as composed for the greater part of "men of small fortunes and mean education." He complained that the Boston men by insinuation made the country members believe the house was barely supporting its privilege, a distressingly absurd misstatement of the case as he saw it.

Viewed in the light of what was to come, service in the house, the election and instruction of members by their constituencies, the correspondence and information of constituents by their deputies, formed an important influence in the political education of the province, in its growing apprehension of the meaning of real democratic self-government, by people, not clergy. Out of the multifarious disputes involved in the nature of things between governor and house, the province learned to know itself, to find where its interest clashed with that of the home government as represented in the governor, to develop and systematize its

resources for opposition and its power to compel the agent of the home government, to estimate the value of the connection with the mother country, a value which might one day seem insufficient to make further continuance worth while.

CHAPTER V. THE SALARY QUESTION.

Among disputes between the governor and the house, considered as a general feature of colonial political life, none is more often referred to than the salary controversy. In Massachusetts, till its settlement in 1735, this apparently sordid quarrel occupied an amount of attention far exceeding that which would be given to a mere administrative detail. Had it not a larger significance? The governor demanded a fixed permanent salary, and the house refused, substituting therefor an annual allowance, all agreeing that the governor should have a support from the province, differing merely upon the method by which it should be granted. In the minds of the political leaders of the province this was held to involve much more than a mere administrative detail, rather a fundamental constitutional principle was at stake, viz., that the disposal of public money was the function of the representative body of the province, subject to no dictation from home. Moreover, with the development of the provincial constitution by the interaction of legislative and executive departments, the provincial leaders gradually came to see that with the salary controversy was involved the yet more fundamental question of the relation of the departments. It came to be realized more and more clearly that, if the executive were supported without reference to the legislature, the former would become a perfectly independent department; if the support of the executive were controlled by the legislature, its freedom would be limited. If the governor's contention prevailed, the executive and legislature would remain co-ordinate; the triumph of the house meant the subordination of the executive, and something in the nature of a parliamentary sovereignty as a result.

In his capacity of royal official the governor was very unwelcome to the province, because he represented an external authority, and his presence involved a substantial limitation on local self-government. This circumstance of itself made a cheerful support by the legislature unlikely, in the light of their undoubted preference to do without him altogether. The poverty of the

province would be adduced as a reason for small pay more readily in dealing with the unwelcome foreign official than in the case of the native military and civil officers. Further, the fact that the governor was a royal officer, who was responsible to the king and not to the province, but whom it ought to pay for the service he was manifestly performing for it, was held to mean that the king was prescribing part of the expenditure of the province. Fortified by three-quarters of a century's experience under the colonial charter, and relying upon the analogy between general court and parliament, the province was fully persuaded that it was the right of the provincial legislature alone to determine the modes of expenditure of public money. The charter required that the issue of money from the treasury be according to the rules and orders of the court. This gave the court the whip hand. The home government might recommend, might command, might even threaten the general court with the dire penalty of an act of parliament in case of a refusal of a fixed salary; but it could not actually grant the money, and as the court chose to run the risk it persistently refused to make the grant, and in the end the home government had to yield.

But if the governor was an official existing for the purposes of the home government, why should he not be paid by the home government, and thus be saved a deal of friction and waste of energy? This suggestion was made at an early period by the board of trade, but was never approved. In the first place, he was so evidently serving the province as well as the home government, that it seemed only just that so much at least of the expense of imperial administration be borne by the province receiving the benefit. In the second place, it was always to be hoped that by some means, (military exigency, political adroitness, or what not), the governor would be able to win his point with the general court, and secure the obedience of the province to the command of the home government. But the payment of the governor from England would have been intolerable to Massachusetts. The saving to the treasury would have been appreciated, but of heavily overbalancing consequence was the constitutional opportunity hinted at in the beginning. The proposition was never formally made in our period, so there was no expression of the opinion of the province; but the indignation in 1773-4 at a similar provis-

ion for the judges of the superior court[1] leaves no doubt what her answer would have been at the beginning of the century. A governor not only appointed in England, but also looking thither for his support, with no personal loss to fear from the ill-will of the province, and nothing to gain from its good-will, would have been (they might say) far more under the temptation to play the plunderer. It was their constant argument that the governor should be induced by his own "interest as well as duty" to consult the welfare of the province. Here is a presumption on the part of the province that the relation with the governor must necessarily be one of distrust and suspicion, a presumption boding no good for the efficient and smooth working of the system. But even if the personal integrity of the imperial official were presumed, it was evident that without such a lever as a variable allowance the legislature could not hope to subject the executive to a subordinate position; it must give up the idea of restoring by gradual encroachment the seventeenth-century parliamentary supremacy of the general court.

The significance of the salary question was appreciated by both parties. At the very outset, by the advice of Elisha Cooke, who as an agent in England, had stood out most persistently for the old charter, and who for many years was the leader of the "country party" in Massachusetts,[2] it was decided that no salary be established for the governor, and instead he was granted every year an allowance "for his service and expense," or "to enable him to manage the affairs of the government." The house realized more or less clearly the doctrine of its leaders, that the annual support could be used as a club over the governor's head to secure some measure of compliance with its will. Accordingly it became the practice to pass the allowance to the governor on the last or next to the last day of the session. Indeed, in 1721 it became a matter of dispute between the house and Governor Shute whether it were not a fixed custom that the house should be informed that the governor had approved the acts, resolves, and elections of the session before it should be expected to enter upon allowances. In 1735, when the demand of a fixed salary was given up, the privy council insisted that the governor's allowance should be

[1] Hutchinson, III. 386, ff., 422, ff.

[2] At his death, in 1715, his son Elisha Cooke, Jr., succeeded to this leadership.

passed at the beginning of the session, to which practice the house thenceforward conformed.[1]

The home government also realized, at least theoretically, the importance of this question. It viewed the matter as did Quary, surveyor-general of the customs, who observed to the board of trade in 1703, that he could not see how a governor could serve the interest of the crown when dependent "upon the precarious humors of the people for a subsistence." "It lays the governor under the temptation of making sometimes a very disadvantageous bargain for the crown and stooping below the dignity of his character."[2] The board of trade said, March 27, 1729, that the appeal of the house to the governor's pocket meant that they would pay the governor in proportion as they judged he deserved, by giving his assent to all the measures which they proposed. Accordingly the king instructed his governor, beginning with Dudley in 1702,[3] "to propose to the General Assembly of our said Province and accordingly to use your utmost endeavours with them, that an act be passed for settling and establishing fixed salaries upon yourself and others our captains-general that may succeed you in the government . . . suitable to the dignity" of the office.

But when mere recommendation was found to be ineffectual, the home government, instead of passing immediately to measures which would bring the matter to an issue, allowed it to drift unsettled. Meanwhile the province was making hay in the sunshine of official indifference, and was establishing a line of precedents that became only more difficult to break as time went on. Governor Shute went home in 1723 with a formidable bundle of charges against Massachusetts, including her disobedience in the matter of his salary. Then at last was the question taken up seriously. In Burnet a governor was found who would insist on doing what he thought to be his duty, in which he included strict obedience to the salary instruction. His whole administration was one brisk fight over that issue. At Burnet's death Belcher was appointed, with strong hopes that skilful management would succeed where high character had failed. But after seven years' experience of a house annually subject to election,

[1] Palfrey, IV. 539.

[2] 3 Mass. Hist. Soc. Coll., VII. 230.

[3] Ibid, IX. 104.

yet unchanging in its resolution not to yield to strong and skilfully applied pressure from two successive governors, the privy council gave up. In 1735 the governor was given permission to accept annual allowances from the house.

A description of the progress of the dispute under successive governors will illustrate the features above outlined. Under the old charter government there had been a system of permanent salaries, attached to the office, not the man.[1] This was subject to no objection in the days of unified, complete self-government. But with the new charter came an entire change of system. Even the native officials were now made dependent upon annual or semi-annual grants by the general court.

It is just possible that if Phips had been instructed as were later governors, and had resolutely insisted on the passage of a permanent salary, the circumstances of the uncertainty then prevailing in regard to constitutional relations in the meaning of the new charter, and the assistance of a council named in England, might have combined to bring success. He did not, however, make such a demand, appears to have been unaware of the significance of the question and of his responsibility as governor,[2] and was apparently content with the "presents" the court gave him. These were indeed munificent in comparison with the salary of the colony governors,[3] but the establismhent of precedents was of the greatest importance in such a case, and the popular body under Cooke's guidance thoroughly appreciated the significance of the opportunity and its own responsibility, gaining thus an advantage by no means lightly to be esteemed. They made him mere grants, single and unconnected, though of so considerable a sum as £500[4] and he approved them; thus was fixed for a considerable period the form in which the support of the governor was to be provided by the house.

Bellomont received no precise instruction as to the attitude he should take on this matter, and his short term was occupied

[1] Osgood, American Colonies, I. 485.

[2] True he wrote to the board of trade that "no salary was settled," and he "desired it might be considered." He requested that the king "nominate to the said assembly a salary sufficient for his support as Governor." Palfrey, IV. 142.

[3] £120 by the establishment of 1653. Mass. Col. Recs., III. 320.

[4] E. g., "for his great service in the government the last year," June 8, 1694, Acts and Resolves, I. 174.

with other concerns. But his tactful cultivation of the Puritan good-will by social complaisance and a popular attitude on most political questions secured him remarkably large presents, and showed how large a factor personality may be even in a constitutional struggle. This is illustrated by Hutchinson's mention[1] of "a speech of his to his lady, when his table was filled with representatives from the country towns.— 'Dame, we should treat these gentlemen well; they give us our bread.'" This Irish peer was estimated at twice the value of Phips, the native ship-builder, and £1,000, was granted by act of July 14, 1699,[2] "to the sole and proper use of" Lord Bellomont, and again just a year later, July 5, 1700,[3] another thousand pounds was granted, the court having "resolved to make a present" to the governor. His house-rent also was paid by the general court, and a special present of £500 was made, to be used by him in forwarding the court's address to the king in regard to Harvard College. By reason of an instruction restraining the governor from accepting money from the assembly without the king's leave express permission was obtained in these cases.[4]

It was no pleasure to Bellomont to have "so precarious a foot for a salary for this government," and he complained of it in his letters home.[5] In his view £1200 would be a more proper figure, and it should be by permanent, not annual, legislative act. The board of trade remarked, April 11, 1700, on the contumacy of the "only Province depending immediately on the King which has not settled an allowance on the Governor," though much better able than others. Ashurst, the Massachusetts agent in London, upon inquiry from the board of trade, made reply that he did not believe the general court would consent to a "salary upon all governors for the future;" but "doubted not but that they might be persuaded to settle a suitable salary upon the Earl of Bellomont during his government."[6] More was to be heard later of this compromise proposition, now suggested by the agent, and later to be supported by the council under Burnet and

[1] Hutchinson, II. 107, note.
[2] Acts and Resolves, I. 394.
[3] Ibid, 437.
[4] Ibid, 766, 777.
[5] August 28, 1699, Palfrey, IV. 177.
[6] Palfrey, IV. 177.

Belcher, but it was to be at first ignored by the board of trade and later rejected by the house.

The first years of Dudley's administration saw the issue sharply defined. In his first speech to the general court, on June 16, 1702,[1] he announced that he was expressly instructed (as above) to insist on fixed salaries for the executive officers, and upon a house for the governor's use, warning them that it was remarked in England that there was no other province where fixed salaries were not granted. The house ignored this point, and merely resolved "that the sum of £600 be at this time presented out of the public treasury to His Excellency Joseph Dudley;" a little later an act was passed accordingly.[2] In its reply to the governor's speech, the house disposed of his argument in summary fashion: "As to settling a salary for the Governor, etc., it is altogether new to us, nor can we think it agreeable to our present constitution, but we shall be ready to do according to our ability what may be proper on our part for support of the government." Later in the year two hundred pounds in addition was granted him by resolve "for his service as Governor and for house-rent for the present year, beginning from the time of His Excellency's arrival."[3] This was the outcome of a thorough consideration of the affair between governor and house, Dudley reading his instruction and telling them they were "parties privileged and as singular in neglect of duty," the house declaring that "it is not convenient (the circumstances of the Province considered) to state salaries, but to allow as the Great and General Court shall from time to time see necessary."[4] The council at first agreed that this was not "a suitable maintenance for His Excellency," but finally recommended that Dudley accept the £200 for the time, hoping better things from a later session.

On April 10, 1703, the privy council passed an order[5] drafted by the board of trade, to be communicated to the Massachusetts council and house, "to require them that in consideration of the great privileges they enjoy they do settle a constant allowance

[1] Massachusetts Archives, CVIII. 1.
[2] Acts and Resolves, I. 498.
[3] Acts and Resolves, VII. 358.
[4] Court Records, VII. 327.
[5] Acts and Resolves, VII. 323-4.

suitable to the character and dignity of that government without limitation of time," intimating that "if they neglect this opportunity of complying with Your Majesty's just expectations Your Majesty will be obliged to have recourse to such remedies as may be proper and effectual to a due provision therein."[1]

The newly elected general court passed a resolve, July 30, 1703[2] — a resolve being usual from now on, instead of an act, which would be subject to veto at home — granting £300 to Dudley "in part for his support in the management of the government thereof the year currant." The council sent a message to inquire of the house whether this was "a gratuity or for service and precisely for how long, and to move a suitable allowance;" but no satisfaction could be obtained from the house, and the council finally advised Dudley to accept it. In September,[3] and again in November, on postponement for the sake of getting a "fuller house," Dudley became very urgent, bringing the house on the 5th of November to the following formal statement and defence of its position: "As it is the undoubted privilege of the English nation to raise any sum or sums of money when and to dispose of them how they see cause, and so hath been from Henry III and confirmed by Edward I and ever since continued as the unquestioned right of the subject, so we hope and expect ever to enjoy the same under our most gracious Queen Anne and her successors, and therefore do account it inconsistent with Her Majesty's interest here, and that it may prove prejudicial to Her Majesty's subjects in this Province to state perpetual salaries." In the March session the annual allowance was completed to £500 by an additional grant of £200 "for and towards his support in the government."[4] Dudley was obliged to write home to Nottingham, April 21, of his disappointment at the "stubborn resolved temper" of the house, "that they will agree to nothing wherein they may show their obedience to Her Majesty."[5]

This temper, moreover, did not yield to Dudley's repeated urgings, nor even to the royal urgency displayed in the letter from

[1] Palfrey, IV. 254–5.
[2] Acts and Resolves, VIII. 23.
[3] Ibid, 339.
[4] Ibid, 52.
[5] Palfrey, IV. 291.

the home government communicated December 27, 1709, calling it "unreasonable" for Massachusetts to expect protection from her Majesty "while they of all the colonies in America do refuse to settle a salary." The last stand was made in September, 1705. In spite of the disinclination of the house to consider a new letter from the queen regarding the repair of Pemaquid Fort and the salary question without a fuller attendance, Dudley insisted that "the House should sit till it made answer." The result was an address to the queen, in which the court justified its course of disobedience on the ground of the right of Englishmen to representation and consent in taxation and appropriation, "which we have hitherto happily Enjoyed under your Sacred Majesty, And we humbly hope and pray will be continued to us and our posterity." In the reply to the governor's speech, reason for non-compliance had also been found in the fact that "the circumstances of this Province as to our ability to support the government are at times so different."[1] At this point the governor lost his last ally; for the council, on being formally asked its advice on the question among others, "Whether they advised to the settling a fixed salary for the Governor and Lieutenant-Governor for the time being?" gave a negative answer.[2]

The question was thus settled for the period of Dudley's administration. The home government left unrealized its vague threat of "further measures," and the house remained master of the field. Every year presents were regularly made, £300 in the summer, £200 in the winter session, and Dudley accepted these gifts, not with good grace, but in a spirit of resignation to disappointment. The variation in amount, which the house feared might be necessitated by the poverty of the province, and which the home government feared might adapt itself to the governor's degree of compliance with the will of the assembly, did not show itself. £500 was the sum regularly granted throughout Dudley's administration, and it might well be regarded as the minimum of decency. Bellomont his predecessor had been ill satisfied with £1,000, and Shute, his successor, received £1200. Dudley himself intimated that it was only his own private estate that enabled him to live on such a pittance.[3]

[1] Acts and Resolves, VIII. 519.

[2] Executive Council Records, VIII. 153.

[3] Acts and Resolves, VIII. 555.

Shute came instructed in much the same terms as was Dudley, though the province of Massachusetts, it was said, "has not hitherto taken any manner of care in that matter."[1] A house was provided for him, so he was spared the pain of insisting on that detail. In his first speech, November 7, 1716, Shute informed the court of his instructions,[2] but as usual received only a grant of £500 "for his support in managing the affairs of government."[3] The following April the house declared that, "considering our constitution, it will not be for His Majesty's service nor for the good and advantage of his subjects here to have fixed and stated salaries, but that we shall very readily do according to our ability what shall be proper and necessary for the support of His Majesty's government over us."[4] The next day "in consideration" that the governor had said "that he came with the utmost resolution to study the true interest of this province," which is "very grateful and acceptable to this house," an extra £300 was granted;[5] Shute accepted it, saying it "will help the defraying the charge of my transportation." In the May session the new house granted £500 for half the civil war.[6] Shute reminded them that owing to the inflated condition of the currency this was not more than £250 sterling, and complained that "the expense I am at even with decency to support my character is greater than you may possibly imagine." In November another £500 was granted,[7] and in February, 1718, still £200 more,[8] "in Consideration of the Dearness of all necessaries of House Keeping."

This total of £1200 was continued till 1720, the year of Shute's most acrimonious disputes with the house. At this time the semi-annual allowance of £600 was reduced to £500, notwithstanding the expression of the unanimous desire[9] of the council that the allowance be not less than during the last three years. Here was a plain case, (in fact, the only one) in which the house administered discipline to a governor for opposition to its policy by

[1] House Journal, December 17, 1720.
[2] Court Records, X. 92.
[3] Resolve 1716, c. 151.
[4] Court Records, X. 126.
[5] Resolve 1716-7, c. 161.
[6] Resolve 1717-8, c. 62.
[7] Resolve 1717-8, c. 133.
[8] Resolve 1717-8, c. 161.
[9] Court Records, XI. 104.

actual reduction of his salary. Shute addressed a joint session of the two houses,[1] said he expected £1200 as formerly, especially since the value of the paper money was sinking. The salary instruction was read. To his exasperation the house replied that it thought it had made an honorable allowance, and since "the affair of settling salaries is a matter of great weight and wholly new to this House," it desired postponement till more should be present. The appropriation was accepted. At the next session, upon Shute's expostulating[2] against the new figure, the house replied that the resolve of last session was adopted "after a free and full debate, and carried by a very great majority of the members of the House." They considered the present allowance "as much as the honor and service of this government call for," and at that figure it remained during Shute's administration.

In the July session of 1721 occurred another instance of the exercise of compulsion on the governor in the action of the house on his allowance. Toward the end of the session the house sent to the governor to know whether he had passed upon the elections of impost officers, which, besides the joint vote of the two houses, required his signature. Shute replied rather testily that he had sent down ten times that he had that list under consideration, and that he might as well send down to the house to know what they had done about his salary, and that the house knew what they had to do. The house thereupon laid down the proposition that they were accustomed to have all legislative acts of this sort completed before they entered upon allowances. The governor made an equally high claim, viz., that he was not accustomed to sign the elections and resolves till after the allowances were passed. The issue of fact was not resolved, but the important thing was that he told the house "they might depend on it that he will sign everything before him before the court rises."[3] Upon this the allowances were passed.

Discouraged by its experience with Shute and his assemblies, the board of trade appear on this occasion to have been ready to cut the Gordian knot; for in March, 1726-7, it made a representation to the privy council "that since the people had, in opposition to the royal instruction, reduced the governor to an avowed

[1] Court Records, XI. 108-111.

[2] Ibid, 113.

[3] Ibid, 186-190.

dependence, it would be proper that he should be paid a salary by His Majesty at home, till the inhabitants of Massachusetts can be brought to a better temper." Granting that it was just and reasonable that the assemblies should be required to pay fixed salaries, "they considered the obtention of so desirable an object as beyond their influence or power, because their records demonstrated how often the same measure had been adopted without success." But the privy council determined to persist, and passed an order March 25, 1727, commanding Shute to acquaint the assembly "that if they hope to recommend themselves to the continuance of Your Majesty's royal grace and favor, it must be by an immediate compliance with what has been so often recommended to them," viz., the granting of a salary of one thousand pounds sterling. Otherwise "it may be worthy the consideration of the Legislature . . . in what manner the honor and dignity of your Majesty's government ought to be supported in these Provinces."

The death of George I vacated Shute's commission just as he was about to return to his province, but his successor, William Burnet, was instructed to the same purport. The necessity was emphasized of compliance to the extent of a fixed salary of £1000 sterling, if the royal favor was to be continued, and in case they "shall not pay a due and immediate regard . . . we shall look upon it as a manifest mark of their undutiful behaviour to us," requiring the consideration of parliament how the dignity of the government ought to be supported.

Burnet's administration was one long controversy between governor and house on the salary question, in which all possible arguments were developed on each side, the governor standing consistently on his instruction, the house with equal determination on its conception of the constitution. Burnet was personally attractive, had a reputation for dignity and efficiency as governor of New York, and the house let him know in the course of the dispute that it was not himself personally that they were opposing, but only the constitutional principle he represented. Moreover, the salary question was now hardly at all involved with other constitutional difficulties, as had been the situation under Shute. Hence we may say that the issue was fought out on its own merits.

Arriving in Boston in July, 1728, Burnet made his first speech to the assembly, July 24,[1] the occasion of a formal demand for the fulfilment of the requirement of the instruction, which he at once communicated to the general court. He adduced three arguments, the wealth of the province, evidenced by its leadership among the colonies in point of trade and population, and by the magnificent reception they had given him; the example of the British parliament in granting the Civil List to the king for life; and the constitutional necessity of a fixed salary, to preserve a due balance of powers in the provincial government, lest if one department of the legislature become unable to support its dignity the whole suffer. He declared his intention as the king's officer "to act by his instructions and to have no inclinations, no temptations, no bias that may divert him from obeying his master's commands," saying that the instruction should be "an inviolable rule for" his conduct,— the novel element in the situation being that in this declaration he meant what he said, and kept his word.

After two days' debate, on July 27, the house voted £1700 to Burnet "to enable him to manage the public affairs of the government and to defray the charge he has been at in coming hither." As being "the very thing against which the said instruction is levelled," viz., an allowance, not a salary, Burnet declared himself "utterly disabled from consenting," lest he incur the king's displeasure. A week later, August 6 and 8, the £1700 was divided, £300 being granted and accepted[2] for the charge of his removal hither, but the remaining £1400, offered "to enable him to manage the public affairs", being refused. The house prayed him to accept it in that form, declaring that: "As the royal charter granted us by King William and Queen Mary of glorious memory has vested in the General Court, the power to impose and levy proportionable and reasonable rates and taxes, and to apply and dispose of the same pursuant to the rights and privileges inherent in us in common with other his Majesty's freeborn subjects . . . so we can

[1] For this and following speeches of Burnet, and the replies of council and house, see Council Records and House Journal, *sub diebus;* also the narrative of the salary controversy, prepared by order of the house April 17, 1729, entitled "A Collection of the Proceedings of the Great and General Court or Assembly of his Majesty's Province of the Massachusetts Bay."

[2] Resolve 1728-9, c. 161.

with all sincerity assure you of our readiness to improve that power in providing for your Excellency such a support as shall be ample and honorable; at the same time we humbly apprehend that his Majesty's service . . . will be best answered without establishing a fixed salary, and apprehending that we cannot in faithfulness to the people of this Province in any other way provide for your Excellency to accept the grant now made and herewith presented not doubting but that this and succeeding assemblies will at the usual times cheerfully afford a support suitable to the dignity of your Excellency's person and station." Two days later, August 9, the two houses agreed in a message to substantially the same effect, remarking also that "we esteem it a great unhappiness that his Majesty should think our method of supporting the governors of this Province a design of making them dependent on the people."

Here was the issue clearly joined. A fixed salary was utterly refused. The plea was not the poverty of the province; for £1400 was an allowance of unprecedented generosity in amount. Objection was based solely on the constitutional privilege of the house to raise and dispose of public money without dictation even from home. The rights of Englishmen, as they understood and applied them to colonial conditions, should justify them in disobeying the instruction. The expression of confidence in the cheerful generosity of future assemblies deceived no one, especially as the court's language did not actually deny a design of making governors dependent.

Burnet immediately replied, August 9. Ignoring the amplitude of the allowance, he said it was not honorable, as it "implies no sort of confidence in the government," "making the support of the government depend visibly on an entire compliance with everything demanded by the other branches of the legislature." He declared that it was a well-known, undeniable fact that allowances had occasionally "been kept back till all other bills of moment have been consented to," the allowance depending "on the obtaining such consent," a deprivation of the "undoubted right of an Englishman, which is to act according to his judgment." Therefore he should never accept a present of this kind.

The houses differed in their manner of answering this message. The council was still of opinion that the purposes of the taxing power would be best answered without a fixed salary, and

that an allowance made at the beginning of the session implied confidence in the governor, and could not be regarded as an attempt to reduce him to subjection. This matter of balanced powers was taken up more boldly by the house. To follow the instruction would be to give up their money power and make the government "too absolute." Referring to the analogy of the Civil List, they could not have so much confidence in the governor as the parliament in the king; for the king's interest is completely identified with that of his subjects, while neither the prosperity nor the adversity of the province has any effect upon the governor's interest. Moreover, the dependence of the council and house on the governor in the case of his veto power upon laws, in that of his power of warrant from the treasury, in defence, and in other matters, constitutes "so vastly more than a counterbalance for any possible dependence of the governor upon them, that it cannot be thought that the Commander in Chief can be thereby prevented acting according to his judgment or remain without support, nor has there been any such instance here that we know of." Their frankness went to the extent of saying that as to "past conduct of Assemblys in making the support of the government conditional . . . it is not easy to say what men may have had or had not in their own views and thoughts, but this we can say, that to have done so, as the case might have been circumstanced, would not have been unreasonable in itself, nor without precedent from the Parliaments of England, when some of the greatest patriots and most wise and learned statesmen have been actors in them." As to confidence in the governor, they say, August 31, "the very method itself is founded on nothing else, inasmuch as they [the grants] always look forward and are given to enable the Governor to go on and manage the public affairs."

After a dispute carried on for nearly two weeks by conference and message between the two houses, their respective positions were formulated on August 22, the house saying "that passing an act for fixing a salary on the Governor or Commander in Chief for the time being will be dangerous to the inhabitants of this Province and contrary to the plain end and design of the powers granted;" the council declaring, "that the passing an act for fixing a salary on the governor or Commander in Chief without limitation of time may prove of ill consequence to the

Province," implying what they had declared August 20, "that a salary may be granted for a certain time to his Excellency William Burnet Esquire without danger to the Province," a concession in which the house refused to concur.

Beyond this point little real progress was made, and the arguments tended constantly to wander from the main point, to become mere criticism and rebuttal of non-essentials. On August 28 the house expressed a desire for prorogation. The governor replied that the instruction called for immediate compliance with his Majesty's will concerning a salary, which would become impossible in case the court were prorogued. "Therefore I cannot agree to a recess till you have finished this matter for which the Court is now met."

This attempt at compulsion did not help matters, nor did the threat veiled under Burnet's refusal of their renewed request, on August 29, for prorogation. In announcing his refusal, he spoke of the withdrawal of his Majesty's favor, and said they "would be very concerned to find the Legislature of Great Britain taking into consideration the support of this government, and perhaps something besides, which I forbear to name," referring probably to the "dissolution" of the charter by parliament. This had been hinted at in Agent Dummer's letter of March 10, 1722, which he later brought to their attention, a letter in which, by Secretary Carteret's friendly advice, he strongly counselled Massachusetts to use more modesty and prudence in conducting her defence lest she be dealt with summarily by parliament.

The house replied on August 31 that whether or not the method proposed was prejudicial to liberty in Great Britain and the other colonies, the "British constitution differing from ours in many respects" and the motives of the other colonies being unknown, Massachusetts could not be influenced thereby. They insisted on their liberties under the charter, as a balance to the powers of the home government. Burnet's message of September 2 emphasized skilfully the difference of opinion which was arising between the two houses, but argued that even if they were agreed, that would be a reason the more why the third branch (i. e., the governor) should not be dependent upon them. He taunted them with their low financial credit, proceeding "plainly from the want of a sufficient check in the other branch

of the Legislature to the sudden and unadvised measures of former assemblies." As to allowances looking forward and therefore implying confidence, he reminded them of the last previous session, when the "method of grants was brought to look directly upon the present business in order to compel a compliance; or if you like that better, to look backward by way of punishment for a denial."[1]

The next step was an appeal to the country, as it were. On September 11 the house adopted an "Advice" drawn by a committee appointed four days previously, "to prevent any misrepresentations that may be made to the several towns." Though there was no dissolution and hence no new election at this time, the close connection and intimate dependence between constituents and deputy made the house desire to "know the mind of their principals," and to desire still more that "their principals" should know the mind of the deputies, should be correctly informed of the doings of the session, and should have a proper apprehension of the arguments supported by the several parties to the controversy. As a conclusion of this "Advice" it was made to "plainly appear that we can neither come into an act for fixing a salary on the governor forever nor for a limited time." Four reasons were adduced, (1) "It is an untrodden path," with many dangers that cannot be foreseen; (2) under Magna Charta Englishmen may raise and dispose of public money without compulsion; (3) it will lessen the dignity of the house of representatives and hence destroy the balance of the constitution; (4) the house must not betray the privileges of the province, its duty being by charter to make such laws only as they judge for its "good and welfare."

Burnet did not let this "Advice" go unheeded, but in his answer introduced no new argument. On September 21 the house renewed the grant previously offered but not accepted, of £1400 "for his support in managing the affairs of the government" and added £1600, completing the year's allowance to £3000 in Massachusetts money, equivalent to the £1000 sterling which he was instructed to demand; but still it was in the obnoxious form that had been hitherto practised, and Burnet announced himself on September 23 "by no means inclined" to assume his Majesty's

[1] The house had refused to consider allowances, on the refusal by the lieutenant-governor to consent to the act for credit bills.

displeasure by accepting the allowance in lieu of salary. He wrote to the board of trade, September 30, that he had no subsistence but perquisites from the shipping, amounting to about £200 pounds a year, but that he had refused to accept the three thousand pounds, since it was offered in the old form, "by which they may at any time bring the same difficulties on me that they have on former governors." But, notwithstanding the inconvenience he was suffering, he was so far from desiring leave to depart from the instruction and accept the gift, that he thought "his Majesty's authority in danger of being lost in this country if it be given up in this point."

Still another heavy weapon the governor tried without success. He advised the house on October 1 that their issue of credit bills, upon which depended the province finance, was likely to be disallowed by the home government because of the contumacy of the province in the salary affair, and that the surest way to save the issue of credit bills would be to appropriate to the governor's salary a part of the 4% interest on the fund. But, because of the permanence of such an appropriation, the house refused, declaring on October 24 that such a procedure would be equal to fixing a salary, "which is concluded by this House to tend very much to the hurt of the people of this Province."

Thereupon the governor adjourned the court for a week, to meet at Salem. His reasons for this move,[1] given to the board of trade, were that, (1) Boston had instructed its representatives to vote against the establishment of salaries; (2) the people of Boston were continually trying to pervert the minds of the country members upon this point, Salem, on the contrary, being well inclined; (3) Boston did not deserve the profit of the meeting of the court. He desired that the home government should disallow the act for bills of credit, and he hoped that parliament would take such action as would at least give the people "just apprehensions of losing" their charter "if they continue refractory." To the court he declared on October 31 that what brought him to the measure was the unanimous declaration of the town meeting of Boston against compliance with the salary instruction. This was taking upon themselves "what his Majesty calls un-

[1] Palfrey, IV. 513.

dutiful behaviour and attempting to give the law to the country," though in this attempt to influence other towns he had the "pleasure to observe that they had very little success." After two weeks the house replied, complaining of the "hardships and difficulties" they were suffering at Salem, resenting the dishonorable imputation that they were under the influence of any single town, and declaring that "the reasons that prevailed with them to determine as they had, would go with them, guide and influence them everywhere." With the argument that ensued as to the illegality of the court's sitting outside of Boston we are not here concerned. But Burnet assured the house that their desire to return to Boston and their persistent contumacy only confirmed him in his opinion that the Boston prejudices had made deep impressions upon them, which only time and absence would remove.

He called to their attention moreover the inconsistency of granting no salary to the governor, while the wages of council and house were fixed by law. With bitter irony he asked: "Would it not have been better to have waited till each session was over to see how much every member of either house might deserve by voting with the majority and to allow them wages in that case only, which is exactly the same measure which the house pursued with Governor Shute when they informed him that they expected the bills to be passed before they would go upon allowances."[1] Nothing but exasperation could or did result from such a display of temper.

The next step was the preparation by the house of a memorial to the king, to justify their course and counteract the effect of the partial statement of the case he had presumably received from the governor's correspondence. They protested loyally that "nothing less than the prosperity and welfare of this your most dutiful Province could have prevailed with us to have done anything disagreeable to Your Majesty's instruction." The familiar arguments were used, such as the opportunity enjoyed by the governor, at a distance from England, to oppress the province unless induced to the contrary by his own interest as well as duty to his Majesty, and the fact that the Civil List at home was for life only. The governor was complained of for keeping the house in session so long at expense to the province, and for the removal to Salem. The unprecedentedly large grants

[1] Collection of Proceedings, 92-5.

to Burnet, notwithstanding these actions of his, were mentioned as evidence of a loyal spirit, "and we doubt not but that succeeding assemblies according to the ability of the Province will come into as ample and honorable support from time to time; and should they not, we acknowledge Your Majesty will have just reason to show your displeasure with them."[1]

The absolute refusal of a salary, and the direct appeal of the house to the king that he withdraw his instruction requiring it, gave the governor an opportunity to put an end to the intolerable situation — an assembly in continuous session for five months with no legislative work to show for it. On the understanding that the dispute was temporarily transferred to the other side of the Atlantic, and that for the present occasion the house had lost its opportunity to show itself dutiful, the court was prorogued on December 22 to meet in April at Salem. Burnet expected no success in the salary conflict, he wrote to the board of trade, "till a censure of Parliament is passed upon the proceedings of the Assembly which I hope Your Lordships will obtain so as to have it sent early in the spring before this Assembly expires."[2]

The home government, as was to be expected, supported Burnet against the appeal of the house. He was unable to obtain a copy of the memorial of the house, but informed himself of the substance of its contents and sent home such answer as he could. The chief burden of this answer was the proposition that "Governors are not the only persons guilty of ambition. The men that affect to be popular in free nations have better opportunity to get exorbitant power than any Governor, and that it has been such men that have commonly ruined the liberties of their country," — in other words, an arraignment of the house as the tool of its leader, Mr. Elisha Cooke, who is made out to be a selfish demagogue, "a profest enemy to the King's lawful authority in this Province."

The board of trade, in February and March of 1729, took into consideration the memorial and the answer and other correspondence, and gave a hearing to governor and house, the latter through its agent Francis Wilks and counsel, the governor through his brother Thomas Burnet and counsel; the home gov-

[1] Collection of Proceedings, 97.

[2] Palfrey, IV. 518.

ernment was represented by the attorney-general and solicitor-general. The governor's side was defended with no more than the usual arguments. The house advocates, on the other hand, were so bold as even to complain that the salary instruction was invalid, being obtained "without the privity of the people," who, if given opportunity, could have presented such reasons as would prevent his Majesty from giving such an instruction, since it was regarded as "contrary to the charter . . . which gave them a free liberty of passing laws for raising money for the defence and support of the government,"—a claim of popular control over the crown's instruction of its agent that must have astonished the home authorities by its audacity. On March 27 the board reported its conclusion to the privy council. As to the desire of the house to make the governor "serve his interest" by governing the province well, this suggests on the contrary the "strongest reason" with the board for requiring a permanent salary, viz., in order that the governor may be free to do all that the prerogative interest demands, whether it please the province or not, without fear of losing his support. They propose that he be instructed to insist on a salary of £1000 sterling "by a law settled upon him during the whole time of his government." If the house do not comply, they know no way but that your Majesty "lay an account of their conduct before your Parliament." Burnet has acted "with honor and integrity" in refusing the allowances offered to seduce him (like former governors) from his instruction.

The privy council received a report also from its plantations committee on April 22, "that the point contended for was to bring the Governor appointed by his Majesty over them to a dependence on their good will for his subsistence, which would manifestly tend to the lessening of his authority and consequently of that dependence which this colony ought to have upon the crown of Great Britain." It was "absolutely necessary . . . that a salary of £1000 sterling per annum should be settled upon the Governor during the whole time of his government." The king should be "humbly advised to order this whole matter to be laid before the Parliament of Great Britain." The committee also observed that Burnet had "acted with the utmost duty to Your Majesty and just regard to the trust reposed in him." The report was approved by the privy council on May 22, and it was

ordered that one of the secretaries of state "receive the pleasure of the crown thereupon."[1]

It is noteworthy here that while this was, as Palfrey calls it, "an absolute approval of the Governor's conduct," it was not an endorsement of his whole claim, but only of the portion of it on which he had the support of the province council, viz., that a salary be laid by law "during the whole time of his government," after the manner of the Civil List granted to the present king for life. It did not go as far as the instruction and insist on a salary for the "Governor for the time being." This may well be the meaning of Chalmers's statement[2] that Newcastle sent Burnet private instructions "to recede from his former demands of a standing salary." For on June 26 Newcastle wrote Burnet that the lords of trade and the lords of the committee of the privy council after full hearing of the case were both "of opinion that the salary of £1000 sterling per annum ought to be settled on you during the whole time of your government." This recommendation of a middle course, however, did not result in any abatement of the terms of the formal instruction. Newcastle's letter transmitted the order in council and said, there is "too much reason to think that the main drift of the Assembly . . . is to throw off their dependence on the Crown," that this has produced the final determination of laying the whole matter before parliament, which had certainly been done this last session if it had not been prorogued before the report was made to his Majesty. "It will be delayed no longer than the first meeting in the winter."

At the opening of the April session of the Massachusetts assembly Burnet gave them another opportunity of showing that their "professions of duty and loyalty to His Majesty are more than words." But the house voted not to "come into further consideration of settling a salary on the Governor at the present session," and the time was largely occupied with a dispute between the two houses as to the support of the agents in England, the council refusing to concur in the appropriation because they had not been allowed to participate in the preparation of the memorial, and had not even seen the instructions regarding its presentation. Such agents, they held, must be regarded as responsible to the house alone, and ought not to be supported by the province. The

[1] Palfrey, IV. 519, note.

[2] Chalmers, Revolt, II. 129.

house was also charged with misrepresenting the council's attitude. The memorial represented the council as "concurring" with the house, whereas the council declared on April 18 its readiness, signified some time previously, to vote a salary, "for a limited time, having good reason to conclude that His Excellency judged himself at liberty by his instruction to accept thereof, and that thereby all complaints home of our non-compliance with his Majesty's 23d Instruction would be prevented."[1] It would be interesting to know what "good reason" the council had for this opinion of the governor's willingness to deviate from the terms of the instruction. In all Burnet's public utterances he insisted on strict compliance, and we have no further information.

On the failure of passage of the resolve of the house to pay its agents, the house could only vote its thanks to certain merchants for their advances on that account, and promise to "use their utmost endeavors" to reimburse them later. It instructed the Boston members to compile and publish all the proceedings had thus far upon the salary question, and was then dissolved. The governor refused to sign warrants for payment of the per diem wages of the representatives, declaring that "it may justly appear doubtful," since "near a third part of the time of the sitting of the General Assembly has been rendered useless by your refusing to do the business of the Province," whether the towns ought to bear an expense, the sole end of which was defeated."[2] Probably, however, he did not help his cause by this proceeding; for the questionableness of its justice gave the individual representatives a very obvious and concrete grievance for exploitation in the election.

The new house, elected as usual in May, 1729, spent short sessions in May and July upon other matters. In the August session Burnet brought up once more the salary question, being now prepared to acquaint the house with the action of the privy council. But the house, willing to take the risk of parliamentary action, merely affirmed its approval of the position of the preceding house regarding salaries, probably having private advice from England of the reluctance of the ministers to introduce such a question into parliament. Having been adjourned by the governor, this time to Cambridge, it made him a grant of £6000 "for

[1] Collection of Proceedings, 111.

[2] Court Records, XIV. 239.

his support last year, and further to enable him to manage the affairs of government." That is to say, they were ready to give him £3000 a year (practically the sum demanded) notwithstanding his harsh treatment of them in adjournment to unusual places, but they would do it only in their own way, by annual grant. He refused it angrily. "If you will not comply with his Majesty's instruction you might at least forbear your endeavour to seduce one of his servants from his declared duty." That day he fell ill from exposure, and a week later he died. The court showed its regard for his person by giving him a sumptuous funeral.

Lieutenant-governor Dummer immediately assumed the government, and announced his determination to insist on the terms of the instruction. Writing to Newcastle on November 4, he described the circumstances of Burnet's death. On the question of "settling a salary during the governor's time," he said, "there was but 18 yeas against 54 noes, so that I cannot see the least prospect of having the matter done here;" "shall press the Assembly at our next meeting on this point." At the next session, though the house made a grant of £750 to Dummer, he adhered to his instruction, and refused to accept it. He took the same stand in the case of a grant of £900 at the summer session of 1730, but just then came the news of his supersession. Tailer, the new lieutenant-governor, had no such conscience about his instruction, and consented to resolves[1] for the benefit both of himself and of Dummer, who was thereby saved from loss, notwithstanding his fidelity.

The death of Burnet gave a respite to the ministry in the dilemma arising from its disinclination to refer to parliament and its desire to use the threat of such reference as a means of coërcing the province. The home government could give the province one more opportunity to obey. If the new governor were skilful, it was just possible that he might win the point, and at any rate here was a delay during which something might turn up. Therefore after getting the opinion of the agents of Massachusetts on November 6 that they knew of no intention on the part of the Massachusetts assembyq to vary their last resolution, the privy council, on the suggestion of the board of trade, made the following proposition on November 12 to the assembly. As a natural consequence

[1] Resolves 1730, cc. 13, 9.

of the refusal of salary by Massachusetts, and because they seem "in some of their answers upon that subject to have forgotten that decency and respect which is always due to their governors," his Majesty was under the necessity of laying their undutiful behavior before parliament, especially since it appeared that the assembly "for some years last past have attempted by unwarrantable practices to weaken if not entirely to cast off the obedience they owe to the crown." But as personal quarrels may have given a temporary bias, their lordships "are for this time willing to interpose with His Majesty . . . to suspend his just resentment till their Assembly shall have had one more opportunity of debating the weight of his royal instruction," and the consequence of refusing "so reasonable a recommendation." Their lordships propose to the assembly to pass a law "that the salary of their governor for the time being shall be £1000 per annum sterling clear of all deductions and that the said salary be constantly paid out of such monies as shall from time to time be raised for the support of the government and defence of the inhabitants of the said Province." Accordingly it was ordered by the privy council on December 2 that "no proceedings be had on the order in council made on May 22d last (i. e., for reference to parliament) until the effect of said proposition be known."

There had been a slight hitch in the arrangement of this proposition, and what looks suspiciously like a surrender of their position by Wilks and Belcher, the agents of the house. On November 6 the board had informally proposed to them "since the assembly of Massachusetts have already by several acts provided stated salaries for their Council and Assembly men, that they should make like provision of £1000 sterling per annum for their governor for the time being." The agents had at first answered that without doubt the assembly would comply, regarding this as "great condescension and goodness in the government here." But it turned out that by this extraordinary statement they meant "that as the acts providing salaries for their Council and Assembly are near expiring, that when the same should expire the Assembly would for the future provide for the Council, Assembly and Governor in the same manner, that is, by an annual resolve every session only, and not by act of assembly, nor for any fixed term whatsoever."[1] Thereupon the board were about to prepare a

[1] Palfrey, IV. 534, note.

report on the "obstinate behavior" of the province, the significance of this dispute for the trade of Great Britain and the authority of the crown, when on November 11 the agents "acquainted Their Lordships that having reflected upon what passed when they attended the Board the 6th inst., having reconsidered their letters, and apprehending that the death of Mr. Burnet might have abated the animosity of the dispute between him and the Assembly, and have made some alteration in the temper of that Province, they were ready to transmit any proposition to the Assembly that this Board should make to them, and would, as far as was compatible with their stations, enforce the success thereof, and were informed by the Board that they would apply to his Majesty for leave to make them a proposition in writing,[1] and would humbly entreat his Majesty to suspend his just resentment against the Province until such time as the effect of the said proposition should be known." This readiness to receive and enforce *any* proposition the board might make is a notable and surprising change of heart in the agents. Possibly they had by this time come to a new and more vivid opinion of the danger to the province from the then possible parliamentary action, and hoped that it might be warded off or at least delayed by the change in governor ship. Is it not also possible that just at this point Belcher openly abandoned the cause he had been sent to England to defend? This "readiness" manifested itself on November 11, just seventeen days before his appointment as governor. From house agent to governor was an amazing transition, but for a man of Belcher's ambition and easy political morals it was quite feasible, and the price paid for his official advancement, it may be supposed, was this treachery to his trust from the house, this readiness to urge the demands of the home government.

As a result of proceedings thus far, the house had now in 1730 a situation to deal with that was no better than that of two years before. Belcher's instruction was even more peremptory than Burnet's. Whereas the assembly has neglected the king's condescending permission that Burnet might accept £1000 if settled on him for the time of his continuance in office, "whereby they have justly incurred our displeasure," and whereas their conduct would have been laid before parliament but that the board

[1] This is the proposition described in the preceding paragraph.

of trade requested that they might have another opportunity, therefore if a salary (in the original understanding of that term, viz., for the time being) should not be laid forthwith, "you are required immediately to come over to this kingdom of Great Britain in order to give us an exact account of all that shall have passed upon this subject, that we may lay the same before our Parliament, unless you think it for our service to send some one else fully instructed."

Belcher met the general court September 9, 1730, and in his first speech communicated this instruction, exhorting them after their long heroic struggle not to continue their emulation of Cato Uticensis to the point of self-destruction. Grants were made to him and accepted, of £1000, £500, and 800 acres of land, in consideration of his services as house agent;[1] but upon the question "Whether it be the mind of the House to fix a salary on the Governor of this Province for the time being?" after a long debate the house voted on September 16 in the negative. The following day they passed a resolve granting £3000 to Belcher in the old form, and sent it up with a message declaring that the house "firmly believe that as this so all succeeding assemblies will with the utmost cheerfulness afford an ample and honorable support for his Majesty's government." They absolutely refused the compromise proposal of the council on October 1 of a fixed salary during Belcher's continuance in office. On October 7 he wrote home to the board of trade that though it was the busy season when their private affairs call them home "I shall keep them sitting till they give a conclusive answer to this grand article." "I have a prospect of their making a dutiful and reasonable return to the proposal." But lacking Burnet's power of will he gave way soon (October 28) to their clamor for adjournment, having won no more than the bill of that same day granting him £2400, which, though no compliance with the terms of the instruction, he regarded as "going a great way further than they have ever yet done, and I think may be taken as a settlement during the present Governor's administration."[2] The lords of trade remarked thereupon that they "are at a loss to imagine how Mr. Belcher . . . could think that this might be taken as a settle-

[1] Resolves 1730, cc. 44, 93, 129.

[2] Belcher to Newcastle, December 10, 1730.

ment during his government."[1] At the new session he succeeded no better, the house declaring January 1 "after the most serious consideration" of the salary instruction that "we apprehend the House ought not to accede thereto." Belcher dissolved the house the next day and summoned a new one.

Addressing himself to the new house on February 10, Belcher said that he hoped after the "broils and confusions in which you have been so long and so unhappily involved . . . you are now come together to be the happy deliverers of your country from the troubles and difficulties that still hang over it. . . . Upon your present determination depends much of the future peace and welfare of this people. . . . Should you oblige me to put in practice that part of my duty to the King in making another voyage to Great Britain there to represent to his Majesty and his ministers your final refusal to support his Governor in the manner he has required, it must produce such consequences to this people as I am sure they will wish they had prevented." But the house knew its man. Belcher had until 1729 been a man of high prerogative principles.[2] He had changed to become the agent of the house. He had then changed to become the enemy of the house. They now knew him to have only one political principle, viz., to serve himself. Upon this basis they were able to deal with him and win their point.

On February 12, after consideration of the governor's speech, on the question, "Whether the House would fix a salary upon the Governor for the time being, according to his Majesty's 27th instruction?" it "passed in the negative by a very great majority." The same answer was given on February 17 to the

[1] Acts and Resolves, II. 633. The bill had merely declared "that at the beginning of the session of the General Court in May next there shall again an Act pass for an ample and honorable support and suitable to the dignity of his station to his Excellency Jonathan Belcher Esq. in the management of the public affairs, and so annually at the beginning of every May session during his continuance in the administration of the affairs of this government and his residence here." This bill is to be found in Belcher's letter to the home government, December 10, 1730, in Sainsbury Papers, misc. files, Mass. Archives. It evidently does no more than promise an "ample and honorable" support at the beginning of each annual session, but gives no guaranty against variation in that amplitude and honorableness of support.

[2] Hutchinson, II. 331.

question, "Whether the House would settle a salary on His Excellency the Governor during his administration?" and on March 9, "Whether they would make any grant for the support of His Excellency for any limited time?"[1] That is to say, the house refused even the compromises proposed, which would have contented the board of trade before Belcher's treachery. But on March 4 the house passed a bill in what was equivalent to the old form, "for the support of His Majesty's Governor in the discharge of the honorable and weighty trust reposed in him;" this was non-concurred by the council the next day. On April 1 the house observed to the board "that they humbly apprehend a compliance" with the salary instruction would "disserve the true interest of this Province in divers respects." But desiring to give honorable support to the governor, the offer of which he has rejected because of the instruction, "this House esteem it the indispensable duty of the Council and Representatives in General Court assembled humbly to address his Majesty," to show him the reason of the non-compliance, "that so His Excellency the Governor may have his Majesty's royal order of leave from time to time to accept the sum or sums that may be granted for his support." Two days later the council accepted the proposal, and the procedure was carried through.

In these circumstances Burnet would have scorned such a proposal.[2] But Belcher was made of differenst stuff, and wrote to Newcastle on April 26 that, seeing "no reason to think they will ever do anything further," he desired leave to sign the bill of October 28, 1730, as "a much better security for a Governor's support than anything has yet been done in this Province." At the regular May session of the new assembly the two houses passed what later became the act of 1731-2, chapter 5, granting £5400 (including the lapsed £2400 of October 28, 1730), "for his past services since his taking upon himself the administration of the government, and further to enable him to go on in managing the public affairs."[3] Belcher sent this home, weakly admitting that it was "unanswerable" that "there is no prospect of anything to be done here conformable to His Majesty's Instruction." He prayed "the Royal Leave to sign the Bill." A

[1] House Journal, *sub diebus*.

[2] His opinion is indicated in his letter September 30, 1728, above.

[3] Acts and Resolves, II. 633.

fixed salary "I am now fully persuaded will never be done unless by the Legislature of Great Britain." This despair of any better result was the burden of many letters from Belcher to various persons in England.[1] Coupled with it was the strong desire of council and house, and, as a consequence of both, the governor's earnest and frequent solicitation that he be granted permission to accept the support as the court chose to give it. Belcher, with every means at his disposal, "improved his interest" to move the home government to grant his request. His correspondence is full of complaints and desire for relief;[2] he cannot see that "my returning to Whitehall could be of any service," but only expense; he believes that "they will not for the future recede from the quantum;" "Nor can I see the receiving my support as the Assembly will give it can in the least measure prevent or defeat what his Majesty in his royal wisdom may think proper for the effectual enforcing his present Instruction;"[3] he cannot see the necessity of "starving the Governor till such time as His Majesty shall put his Orders into effectual execution."[4]

The result of this effort was that by orders in council he was granted the royal permission to accept the grants of the general court, at first an order for each bill,[5] accompanied by a repetition of the original requirement of fixed salary,[6] a tediosu process involving much vexation and expense to Belcher. Finally on November 6, 1735, a general permission to pass the annual act, without reference home for specific orders of leave, was issued.

[1] To Newcastle, Belcher Papers, 475; to the lords of trade, ibid, 14, 68, 307; to Martin Bladen, ibid, 63; to Townshend, ibid, 92; to Alured Popple, ibid, 469.

[2] To Newcastle, the board of trade, Walpole, the Attorney-general, the Lord President, his son Jonathan Belcher, Jr., and his agent, Richard Partridge. Belcher Papers, 6 Mass. Hist. Soc. Coll., VI.

[3] Belcher to lords of trade, October 29, 1731.

[4] Acts and Resolves, II. 633.

[5] 1731-2, c. 5, order in council Nov. 9, Acts and Resolves, II. 633-5. 1732-3, c. 11; do. Feb. 21, 1733; ibid, 661. 1733-4, c. 12; do. Jan. 10, 1734; ibid, 703. 1734-5, c. 18; do. Nov. 7, 1734; ibid, 746. 1735-6, c. 23; do. Nov. 6, 1735; ibid, 790.

[6] Provided nevertheless that this condesention on the part of the Crown shall not in any wise be drawn into President for the future, nor be in any degree construed to enervate the validity of His Majesty's former Instruction upon this Head." Acts and Resolves, II. 634.

It was a pure surrender. The home government tried to save its face by requiring that the annual act of allowance be passed at the beginning of the session, so that the appearance of compulsion was avoided; but upon the crucial point, the temporary determination of the governor's pay for one year at a time by the general court, the province won a complete victory. Under Shirley, in 1741-2, the question seemed likely to revive. On January 21 and March 27, in successive sessions, he demanded a regular salary of £1000 sterling, and supported the demand with an elaborate argument. But the house unanimously declined to follow the suggestion, and upon the newly elected house taking the same position, he accepted their grant in the accustomed form, thus showing that the controversy was at an end.

The charter power of the purse certainly favored the contention of the house. The governor might argue as he pleased about the desirability on general principles of the independence of departments, but the province did not wish an independent governor. Executive weakness and preoccupation, combined with indifference in the earlier days on the part of the home government, gave the province an opportunity, that was fully used, to develop a sentiment and a line of precedents for legislative control of executive officers' salaries. When the time of trial came, in 1728, this was found to be too strong to break.

CHAPTER VI. CONTROL OF THE TREASURY.

Like the mother country,[1] Massachusetts bought her liberties. The power of the purse was a weapon with which she extorted privilege after privilege. It is peculiarly important therefore to describe the shape this power took, its mode of action, and the extent to which its consequences were pushed. We shall consider in this chapter various phases of the dispute between the prerogative and popular bodies, regarding their respective financial functions and powers. The control of the treasury will be considered from the points of view of income, of appropriation, and of audit.

The raising of revenue, as might be expected in an English community at the end of the seventeenth century, was in all points subject to the consent of the popular body. Taxes, of whatever sort, were levied by the general court, composed of the house, the council, and the governor, acting concurrently. From 1634, almost the very beginning of the history of the colony, the function of tax-levying had been performed not by the assistants alone, even though they were elected by the general court, but with the concurrence of the deputies, who were directly commissioned from their towns, and thus more immediately dependent upon the people. With an experience of fifty years of taxation entirely self-granted, it was hardly to be wondered at that the Andros system met stubborn resistance. Taxes laid by a nominated council, it was thought, with no sort of dependence on popular election, were unconstitutional and ought to be resisted, even though equitably levied and no more burdensome than under the old regime. It was for constitutional principle that the men of Ipswich and Taunton protested and refused to pay council-laid taxes. Here was reason enough for the failure of Andros unless he should be equipped with sufficient force to crush a people stubbornly attached to what they regarded as their constitutional right. A wise recognition of this fact secured the declaration in the charter that it should be for the general court to "impose and levy proportionable and reasonable Assessments Rates and Taxes

[1] Hallam, Middle Ages, III. 162.

upon the Estates and Persons of all and every the Proprietors and Inhabitants of our said Province or Territory."[1]

But it was not enough that the consent of the house should be requisite to taxation. From the analogy (however fanciful) between councillors and representatives on the one hand, and lords and commons on the other, the house developed an ideal toward which it strove, an arrangement in which the council was deprived first of the power of initiating, then, at least theoretically, of the right of amending, money bills. Since 1407 the commons had claimed the exclusive right to initiate, and since the Resolutions of 1671 and 1678, to amend.[2] So we find the Massachusetts tax bills invariably originated in the lower house. During the first ten years of provincial administration there seems to have been no objection to participation by the council in the framing of the tax bill, by resolution proposing alterations, or by conference between the two houses.[3] It became customary for the house to send up "proposals," which the board discussed and perhaps amended, which the house then threw into the form of a bill for passage by both houses. Under Dudley, on November 3, 1702, when consideration was upon the repair of Pemaquid fort, the house refused to confer. The council insisted that the refusal to confer "upon that head or any other affair referring to the government is a great infringement upon the rights and privileges of the Council." At this time the house yielded and a conference was held, but with the increasing of the prerogative tendency in the council under Dudley and Shute, the house came to a higher stand on the point, and by 1721 always refused conferences on money bills, as "not a proper subject for conference."[4] While the council in this later period usually refrained from attempting amendment, at any rate without conference between the two houses, the custom was, when the council suggested amendments whose utility the house could appreciate, for the house to withdraw its former bill and frame a new one, that the precedents of house origination might be unbroken.[5]

[1] Acts and Resolves, I. 16.

[2] Medley, English Constitutional History, 279, 280.

[3] E. g., December 8, 1692; June 15, 1694; June 2–25, 1698.

[4] E. g., December 9, 1725.

[5] E. g., the excise bill of 1726, Court Records, III. 186-199.

The form and duration of acts of taxation were such as to ensure popular control. The direct general property tax, the main financial reliance of the government, was granted each year (until 1700 usually semi-annually) as a single lump sum in pounds, shillings, and pence, assigned to be paid by each town, after the manner of the "country rate" of the colonial days, which, when it had been once paid, ceased to have any force. This provided some 65 per cent. of the revenue. Some 20 per cent. came from the import and tonnage duties. These duties, though permanent in their nature, continuing practically unchanged from year to year, were nevertheless always limited expressly by the terms of the authorizing acts to the duration of one year. Some 10 per cent. of the revenue came from the excise on wines and spirits. This was passed in acts of varying duration. Until 1716 it was annual, like the impost, with which in fact it was usually joined in one bill. After 1716 it was usually granted for a term of five years,[1] presumably for convenience of administration, and because of its comparative insignificance as a means of financial control.

For the immediate needs of the treasury, however, in the payment of obligations, the government was much more dependent on the bills of credit, and their authorization came to be regarded as the "supply" of the treasury, while the taxes were looked upon as a fund for sinking them, or more remotely as a means of keeping up their credit. The supply was made in a resolve, which came at least twice in the year, but more often in emergencies; it may even be said that this fact determined the number of sessions a court should hold, since the granting of supply would be regarded by the administration as the main business justifying the holding of a session of the court. Burnet supposed this form of supply, by resolve instead of act, to have been adopted because resolves were not required to be transmitted to England for the approval or veto of the privy council. He argued the matter with the house in 1729,[2] and had the better of it for logic and ingenuousness. The practice was explicitly forbidden in Dummer's and Belcher's instructions, and was discontinued after September, 1729.

[1] E. g., Act 1716-7, c. 1.

[2] Court Records, XIV. 273.

It was regarded as a settled principle then that the raising of revenue should be by the representative, not the appointive, body in the government. Whether or not the supreme representative body of the empire should have a part was not questioned practically till many years after the charter was granted, but a hint was given, which might have prepared the colonists for what was to come in 1765. An act was passed by the general court October 13, 1692, in which was included the declaration that "no aid, tax, tallage, assessment, custom, loan, benevolence, or imposition whatsoever" should be "levied on any of their Majesties' subjects or their estates on any color or pretence whatsoever, but by the act and consent of the Governor, Council, and Representatives of the people assembled in General Court."[1] There is nothing to indicate that this was a conscious protest against parliamentary taxation, but the privy council, perhaps suspecting colonial insubordination and claim of self-sufficiency, disallowed the act, as Chalmers says, on Chief Justice Holt's advice, "because it contained what none of his predecessors had ever conferred." The reasons of disallowance given in the privy council's letter were the presence in the act of clauses making lands and heritages free from "year day and wast, escheat and forfeiture upon death of parents," except in cases of high treason," which is repugnant to the Laws of England," and for requiring bail to be taken in all cases but treason and felony, "which with other privileges proposed by the said Act not having been as yet granted by His Majesty in any of the plantations it was not thought fit in His Majesty's absence to allow the same."[2]

But leaving aside the question of parliamentary taxation, Massachusetts was, in respect to financial control of the local administration, far in advance of those provinces where the "revenue" was fixed for periods of years and subject to no alteration by the legislature during its continuance, and was to that degree in a better strategic position for the constitutional conflict.

The control of expenditure was a matter of more immediate concern to the conflict between prerogative and privilege. There was more uncertainty about the rights and powers of the two contestants, and more shifting of position in the course of the struggle. Yet the charter provision seemed too plain to leave room

[1] Acts and Resolves, I. 40.

[2] Ibid, 41.

for dispute. The taxes raised by the general court were "to be issued and disposed of by warrant under the hand of the Governor . . . with the advice and consent of the Council for our service in the necessary defence and support of the government of our said province or territory, and the protection and preservation of the inhabitants there according to such acts as are or shall be in force within our said Province."[1] That is to say, the general court should raise money and grant it to the king, who should spend it for the good of the province through the body presumably best qualified for that prudential service, the governor advised by the council; but there should be a degree of popular control in that the main channels of outgo, defence and the support of the government, were to be regulated by the general court. The phrase "according to such acts" evidently meant general provisions, such alone as could be made by a legislature. Payment of the specific obligations which the province should incur under these acts, was to be ascertained and allowed by the executive body, being a merely ministerial, administrative act. Such was the practice of other provinces, at least in the early part of the period.[2] But Massachusetts, with her past, could not allow the imposition of such a system without a struggle; and the outcome of this struggle, one of the longest and most stubbornly fought of all, was a wide divergence from the spirit of the charter and instructions. Massachusetts did not win the form, as she did in the salary dispute, but she won much of the substance.

The popular ideal, as contrasted with the above system evidently provided in the charter, was popular representative control of money, beyond the point of its entrance into the treasury, and of more detailed and specific character than could fairly be indicated by the term legislation. Not only the raising, but also the spending of public money, should be by the general court; and in the concurrent action of the two houses, not the council as the charter intended, but the house, should have the preponderating voice. The seventeenth century, the period of the self-governing quasi-commonwealth, gave a line of precedents which essentially, though not formally, favored the claim of the house.

[1] Acts and Resolves, I. 16.

[2] Greene, Provincial Governor, 121.

The "country treasurer" was annually elected[1] in the general court of election, and his issuance of money from the treasury might be only upon the command of the assistants or the general court, whose servant he was.[2] While the assistants were not regarded as inferior to the deputies in those days, it was because they were recognized as the complete, sufficient depositary of the traditional ideal of the colony. This character having passed largely to the house with the new charter, the assumption by the house of a preponderating influence on the whole financial process, came to be regarded as an object of the utmost importance. Under whatever form the law might take, an arrangement practically amounting to this ideal must be attained. This is not presented as in any degree contravening the legal distribution of powers, but only to put into form the sentiment which seems to have been held by the colonists, and thereby to explain the consistent course followed by the house, of encroachment on the charter powers of the council.

For the first ten years of the provincial period, the executive as well as the legislature being almost completely under colonial influence, (except in Bellomont's short term), there was little evidence of this spirit. But with the opening of the eighteenth century, and to a constantly increasing degree under Dudley and Shute, we observe the house encroaching on the council's discretionary power of issue from the treasury, making separate legislative acts for the payment of province debts, and confining issues from the treasury to such matters as they had passed upon. The climax was reached under Shute, when in 1721 it was provided in a supply resolve[3] that not even the muster rolls according to legal establishment should be paid until they had been passed upon and approved by the house. From this extreme claim, however, as will be seen below, it became necessary to recede.

The control exercised by the house throughout the period was twofold — appropriation and audit, the determination first where the money should go, later whether or not it had gone there. These will be considered in turn.

[1] This practice was continued during the provincial period.

[2] Osgood, The American Colonies, I. 492, 493.

[3] Resolve 1721, c. 42.

Appropriation was generally understood to be in the power of the general court. Issue from the treasury "according to such Acts" was the charter recognition of it, and another bit of evidence is a representation made by the board of trade to the king April 15, 1697, on the matter of salaries, where it is said that the revenue of Massachusetts (by the new charter) "is disposable by the Assembly there."[1] The right to originate appropriations seems not to have been confined to the house, nor was there, on most occasions, any unwillingness to confer with the council, though we find, e. g., in August, 1728, and October, 1703[2] in times of heated discussion, the house was unwilling to confer with the council on the bill for the governor's support, though willing to confer "on the subject matter of the bill."

Three forms of appropriation may be distinguished, first the general terms in the preamble of each supply bill, designating the purpose for which the money was granted to the king; second, the contingent authorization of expenditure or actual appropriation in general terms; and third, specific appropriations, whether in advance or ex post facto.

The purposes for which the taxes of various sorts were declared to be raised, the first species of appropriation, were necessarily stated in general terms for the most part, but a tendency may be observed to the use of more and more specific language. The tax of 1692 was granted in these terms: "We . . . being sensible of the necessity of raising moneys for the defence of Their Majesties' subjects and interests and prosecution of the war against their French and Indian enemies, and for defraying of other the public charges of the Province" do give "unto their most excellent Majesties, their heirs and successors, to the ends and intents aforesaid" a rate or tax. Defence and the support of the government, then, were the objects to which the public money might be applied. Under this very vague limitation the governor and council were left free to decide in their own discretion upon the specific application. But almost immediately a tendency to greater precision in these supply bills began to manifest itself. A good example of the new sort is the tax of 1697, "providing for the safety and defence of His Majesty's subjects and interests in this Province; for

[1] N. Y. Colonial Documents, IV. 263.

[2] Court Records, XIV. 133, 134, 419.

repairing and setting in order the Castle and fortifications about the same, and farther strengthening and enforcement thereof; the purchasing of provisions, ammunition, and other stores of war, the fitting, victualling, and manning of the Province Galley and fireship, the hire of transports and other vessels that have been here taken up and employed in His Majestie's service, the subsisting of seamen and soldiers posted in garrisons and sent forth in pursuit of the enemy, and for the support of the government, and answering of the incident and contingent charges in and about the same . . . and of other the just debts due from this Province for the payment of such salaries, gratuities, and allowances as have been or shall be made by the General Assembly, and all such allowances and payments as are directed by any act of this Province, to be paid out of the public treasury; and for the further support of the government, defence of the Province, and prosecution of the war against His Majestie's enemies; and for no other ends or uses whatsoever." Here were the forms which expenditure for defence and the support of the government might take, well defined. Specific objects were mentioned, e. g. the province galley and fireship, and the discretion of the governor and council was limited by a prohibition laid upon them of going beyond these authorizations in the terms of the act. The general court granted the taxes, as they were required, to the king, but he was to spend the money for these objects prescribed, and "for no other ends or uses whatsoever." The freedom with which his Majesty might use the gift of his loyal subjects was usually limited either in this way or in the form used in the act of 1699-0,[1] "to the end beforementioned, and for such other use and uses as shall be limited and appointed by this court and no other." But this phrase was dropped from the tax act of September, 1703, and did not reappear till the famous supply resolve of 1721, when it was the occasion of the dispute that resulted in the reservation by the house of the right to pass muster rolls.

"Incident and contingent charges in the support of the government" was an item of much importance in the list of authorized expenditures, for the part it played in discussion, if not for its intrinsic importance. Manifestly, for convenience of administration, since the house could not be in session all the time,

[1] Acts and Resolves. I. 386.

a certain amount of discretion must be left with the council to pay unforeseen charges (e. g. expresses, and the entertainment of Indian messengers), if effective provision were to be made for the payment of the public debts. The elasticity of such an indefinite term caused the house to regard it jealously, yet we find it included in the supply acts almost uniformly until that of July 3, 1708. From then until the misunderstanding under Shute it was omitted. In June of 1721 the house insisted on a supply resolve limiting the discretion of the council to certain enumerated uses "and no other ends or uses whatsoever," gaining also the much more significant power of examining muster rolls. The following year the problem was solved finally in the method of the resolve of March 22, 1722,[1] a method followed from that time on, which granted £8000 for soldiers' wages and subsistence, £3700 for debts of the province and allowances by the court, and £300 for expresses, "together with all other unforeseen charges whether by invasion or otherwise arising in the recess of this court that demand prompt payment." The troublesome discretion should be allowed to the council, but it should extend only over an insignificant part of the budget, three hundred out of twelve thousand pounds ($2\frac{1}{2}\%$).

The tracing to its conclusion of the item of "contingent charges" has necessitated a slight anticipation. Coming to the second species of appropriation, viz., the contingent authorization of expenditure in general terms, we deal with what seems to have been the sole appropriative function of the house as contemplated by the charter. By acts of the general court were regulated the rates of pay and subsistence for all branches of the military and naval service — at least after 1696.[2] The establishment of pay for councillors and representatives was also by act; and, by an inconsistency which Burnet did not neglect to point out, these salaries were practically payable to the office rather than to the man, that is, to the representative for the time being, an impersonal permanence which the house refused to extend to the pay of the governor.

Casual payments were also authorized, in the shape of bounties, whether industrial, for the slaying of wolves, the production of hemp, etc., which were usually permanent; or mili-

[1] Acts and Resolves, II. 235, 236.

[2] See below, Chapter VII.

tary, for enlistment, or Indian scalps, which rested on annual or temporary acts.

The third and last class of appropriations to be described is the specific allowances. These included first, appropriations in advance, as for public works, bridges, fortifications, pensions to individual soldiers (there being no general pension law), and miscellaneous "allowances" for various purposes; and secondly, what might be called ex post facto specific appropriation, the ordering of allowances or gratuities to officers of the province (including a gradually expanding salary list), the recompensing of specific services already performed, the paying for goods purchased by the province,— in a word, payment of the "debts of the province," one of the general purposes for which, as stated in their preambles, the supply acts were passed. This indicates the relation between what we have called the first and third modes of appropriation. They were not mutually exclusive, but were two different views of one process. The general court granted money to the king for certain purposes. Not content with a greater and greater precision in the general definition of these purposes, it took care to prescribe the modes and the specific forms which these purposes should take, ignoring the bestowal of this function by the charter upon the council.

The right to audit the public acounts, as a means of popular control of administration, had been long contended for by the commons of England with varying success, finally complete in 1667.[1] The representatives in Massachusetts were not slow to develop the same principle; and against this, if the term audit be interpreted in its usual sense, the home government and its agents had no objection. The right was in fact guaranteed in the charter. The accounts of the treasurer were submitted to the house annually (until 1696 semi-annually), inspected by them, and passed as a resolve of the general court. These accounts were minutely itemized, and the house was thus enabled to find out precisely what payments had been ordered by the governor and council, and, if it seemed necessary, could present specific payments as grievances. The money being gone from the treasury, these protests against items as "not according to any act" would have no more effect than to furnish the council a guide in future as to the wishes and policy of the house. But they

[1] Medley, English Constitutional History, 242.

served another purpose in giving opinion an opportunity to form itself on specific expenditures, and in showing the house how and where to tie the council's hands by greater precision in future appropriations.

At one time the house attempted to extend this control and make it more effective by resolving, that if the treasurer should answer such of the council's drafts as were not conformable to the supply act, those items in his account would not be allowed by the house on audit. This would mean the introduction of a second discretion unknown to the charter (viz., that of the treasurer, in whose election the house was predominant), in addition and superior to that of the council, in the interpretation of the acts of supply and the applicability thereto of specific payments. The attempt was strenuously resisted by the council,[1] and the outcome was inconclusive. The occasion of this dispute was a vote of the council authorizing certain commissioners on an Indian negotiation to draw on the treasurer for what might be "further necessary" for their expenses, and a second vote approving the commissioners' bill of £390, to meet which the council "thought the honor of the government concerned." This, the house thought, looked "little short of a dissolution of the very foundations of our happy constitution;" the council might as well lay taxes; perhaps if the commissioners had drawn £10,000 the council would have felt in honor bound to order payment.[2] The incident was left unclosed, and no more was done about the matter, but the treasurer and council had received the thoughts of the house in no doubtful terms, which was perhaps all that was expected.

This was only incidental to the settlement, now near at hand, of the whole question of financial control, and the relation thereto of the several governmental organs.

The passing of muster rolls was the occasion of one of the sharpest of all disputes between governor and house. It was an attempt to establish a double control, for by general laws the wages of officers and soldiers and rates of subsistence were fixed in advance. The question was only whether or not the actual allowance for payment of this, that, and the other garrison or party of soldiers, should be by the governor and council in the

[1] Court Records, XII. 155. September, 1723.

[2] Ibid, 160.

form of an executive order alone, or by the house, council, and governor in the form of a resolve, followed by the executive order, which was thereby rendered purely perfunctory. As the legal limits of the expenditure were set by the general court in any case, this right was insisted on by the house for the sake of a control not financial but administrative. It was a financial pretext or cover for an attempt at control by the house over military affairs, the movement of troops and the size of garrisons.

Down to 1721 this purely ministerial function of giving approval of the muster rolls was performed by the governor with the advice and consent of the council, according to the plain sense of the charter. The act of 1694, "In Addition to the Act for General Privileges," though disallowed, had its effect on the action of the council for several years, in making the form of their order a little more precise. Each warrant for issue from the treasury had to express particularly the act by which the money was raised and for what particular service under that act the same was designed.

In June, 1721, at the climax of the dispute between Shute and the house, the latter body insisted on adding to the supply resolve, after the enumeration of objects for which the supply might be used, the words, "and for no other uses and intents whatsoever." The council protested against such a phrase as contrary to precedent, and as likely to cause inconvenience to administration, "incident charges" not being provided for. But the house would not yield, and the result of a ten days' dispute was a resolve passed July 6,[1] which restored indeed to the council the clause providing for unforeseen charges in the recess of the court, but secured the following proviso, an innovation in favor of the house: "The Muster Rolls or any account of charge or expense on the Castle Forts or Garrisons shall not be paid until such Muster Roll or Account of Charge or Expence hath been examined and allowed of by this Court." Thereafter for ten years practically every muster roll appeared in the legislative as well as in the executive records of the council, its action in the latter capacity being purely perfunctory. The house was accustomed to refer the rolls to a committee, which would examine and report that the persons did duty as the rolls set forth, and that the sums should be allowed to the persons therein according to the roll,

[1] Resolve 1721, c. 42.

that the account was "right cast and well vouched," now and then omitting an item from a roll presented, because of the failure of the person entered to serve the time recorded.[1] To the council's suggestion of a joint committee to examine the rolls in order to save time, the house uniformly made refusal.[2] It was in their opinion the business of the house alone to originate this legislation, and it was for the council and governor merely to concur and consent.

Shute included this matter as one of the charges in his general arraignment[3] of the encroachments of the house, rightly explaining it as a cover for grasping control of the militia. The house defended itself with the disingenuous plea, that it was merely desirous of making sure that the payments on the rolls were for service actually performed according to law, not to see if its orders had been obeyed — ignoring the real issue, that this function of verification belonged by charter to the governor and council. Lieutenant-governor Dummer, who held the chief command in the province during the five and a half years between Shute's unceremonious departure and Burnet's arrival, regarded the new system as a necessary evil, which he must accept and endure, contenting himself with "exhorting" the general court in his speech on May 29, 1724, "in your next supply to his Majesty for the service of this Province to avoid such restrictions as have of late very much employed us."[4]

Burnet made a strenuous fight on this issue, but it was overshadowed by the salary question, and neither matter was settled during his short term. Having early assented to one resolve in the new form,[5] he refused his consent, though strongly urged by the house, to the supply resolve in the summer session of 1729, thinking it improper to consent to any form of supply but such as was practiced before 1721.[6] He argued that the governor's right as previously enjoyed had been wrested away by the house in 1721, not by act but by resolve in order that it might not

[1] Massachusetts Archives, XCI. 30.

[2] Court Records, XI. 192, 258.

[3] Shute's Memorials of August, 1723, and March, 1724. Brit. Col. Papers.

[4] Court Records, XII. 172.

[5] Resolve 1728-9, c. 185.

[6] Court Records, XIV. 253.

be vetoed by the king.[1] "This is the very thing that Mr. Att'y and Soll. General observe upon the third article of Governor Shute's complaint."[2] Upon Burnet's death the supply resolve was consented to by Lieutenant-governor Dummer as presented by the house. But he wrote home for advice,[3] saying that there had been opposition every year in council, but the "necessity of a supply of the Treasury for the support of the government has weighed with me in the passing of it, as it has bin done for eight years past having no prospect of retrieving that article at present; But it seems to me, that the clause in the charter upon which that matter depends, does require an explanation from the Crown, or it will be every year an occasion of further contention in the Legislature, to the prejudice of His Majesty's service and the public good."[4]

By Belcher the matter was brought to a final issue, and settled, at least formally, in the council's favor. Dummer, in his second term as commander in chief, (that is, after Burnet's death) had been explicitly instructed[5] not to consent to the new form of supply resolve; and the same instruction was continued to Belcher, and was early communicated by him to the house.[6] The preamble to the instruction showed upon what experience the home government founded its policy: "Whereas an unwarrantable practice hath of late years been introduced . . . of raising money and supplying the current service of the year by a vote or resolve instead of by an act of Assembly, and of reserving thereby to the said Assembly a power of determining what accounts shall or shall not be paid even after service performed expressly contrary to the tenor of the charter" — therefore it was required for the future "that no money be raised or bills of credit issued . . . but by Act or Acts of Assembly, in which Act or Acts one or more clauses of appropriation may be inserted, but that the issuing of all moneys so raised or bills of credit be left to our Governor or Commander in Chief of our said Province, with the advice and consent of our Council according to their charter,

[1] Court Records, XIV. 273.
[2] Acts and Resolves, II. 574.
[3] Resolve 1729-0, c. 68. Acts and Resolves, XI. 435, 306.
[4] Acts and Resolves, II. 222.
[5] House Journal, May 28, 1730.
[6] Court Records, XV. 158–160.

subject nevertheless to a future inquiry at the then present or any future Assembly, as to the application of such monies."

Accordingly Belcher announced, on April 2, 1731, in his speech to the general court that "for the future all accounts of service done for the Province are to be brought directly to the Governor and Council and to them only for passing and paying."[1] The house did not let this go without answer, and sent a message on April 20,[2] arguing that the house had a right to pass accounts, because there would otherwise be no means of stopping illegal payments. As to precedents before 1721, it was said that immediately after the coming of the charter "accounts were passed on for payment by the House after service performed and common accounts of wages and subsistence not called muster rolls were not only brought originally to the House for their inspection and allowance, but were also sent down for that end by the Hon. Board," and also every year since, as was shown in the minutes of the proceedings, annually sent to England by the secretary, and not hitherto discountenanced by the home government. It was true, as has been shown above, that the house had been receiving and passing accounts for service performed, but these had been specific appropriations for objects not otherwise provided for, and had not been, like muster rolls, mere authentications of accounts already made legal by previous act.

Here we see the issue defined, and the parties in position. In April, 1731, with great reluctance the house granted a supply of £6000 according to the instruction, omitting the clause which would have restricted drafts to accounts passed by the house,[3] but thereafter they refused to depart from their previous position. In contrast with his vacillation on the salary question, the governor was firm in this case, and the resulting deadlock continued for two and a half years. Though the lack of supply caused great hardship to the creditors of the province, this did not affect the governor's pocket, as the general court could and regularly did make special supply for his salary allowance. Perhaps for this reason he could more clearly see the constitutional significance of the issue. Firm before the house, he also steadfastly advised

[1] Court Records, XV. 57.
[2] Ibid, 67.
[3] Ibid, 78.

the home government to persist. He wrote to Newcastle,[1] "All the struggle in that matter is for power; if every account of the Province must be subjected to a House of Representatives the King's Governor will be of very little signification. They that have the control of the money will certainly have the power, and I take the single question on this head to be whether the King shall appoint his own Governor or whether the House of Representatives shall be Governor of the Province."[2] This was only two months after the house had shown equal determination in a vote on November 3, by 56 to 1, that a relinquishment of the ground taken by the house "would necessarily tend to destroy the powers and privileges granted to the General Court in and by the royal charter."[3] Moreover, on November 24 the house had assured the governor "that as long as this Assembly retain any regard to the great trust and confidence our electors have put in us, all efforts to persuade and induce us to forsake their true interest and bring them and their posterity under the weight and burden of such innumerable and inconceivable inconveniences as they firmly believe may soon be their lot and portion should the House give in to the aforesaid Instruction" would be fruitless.

Three times in vain did the house appeal home for the withdrawal of this instruction, which the governor alleged to be an insuperable bar to his passing supply in the form desired by the house. On passing the supply of £6000 in April, 1731, in terms which were in accordance with the instruction, an address to the king was formulated by the house, and in June another address was sent by the house and council together, praying for the removal of this bar. But the privy council on December 23, 1731, advised the king to adhere to the instruction. At the end of 1732, on December 14, the houses voted concurrently to address his Majesty again, "and in case the address have not the desired success that a memorial be laid before the Hon. the House of Commons if sitting, praying their intercession with his Majesty that he would be graciously pleased to withdraw the instruction." This appeal to the commons aroused Belcher's indignation. He said it was "without precedent among the plantations;" there was no occasion "for treating his Majesty so inde-

[1] December 26, 1732.

[2] So also he wrote to Walpole January 1, 1733. Belcher Papers, 493.

[3] Palfrey, IV. 543, note.

cently and disrespectfully." Considering that it was only intercession that was desired from the commons, it might be questioned whether there was disrespect in the form, but without doubt the intention was to bring political pressure to bear upon the ministry. In any case it was fruitless; for the commons manifested their disapproval, and in an order in council of May 10, 1733, the king signified his "high displeasure" at these repeated applications, and the instruction was ratified and confirmed.[1]

The plantations committee of the privy council obtained the opinion of the attorney-general and solicitor-general, that the instruction was "perfectly agreeable" to the charter; as to the issue of money, "the words of the Charter are very plain," that it be by governor and council, meaning "according to such general clauses of appropriation, describing the nature of the services for which it was given, as should be mentioned in such acts but not to restrain the Governor and Council from making such a distribution upon the particular articles of those services or from passing the accounts and paying the persons by whom such services should be performed in such manner as they should think fit consistently with the general clauses of appropriation. But such distribution of accounts and payments will be subject to future inquiries to be made in a regular method by the Assembly or House of Representatives as to the application of the money and the consistency thereof with the appropriating clauses for which a proper reservation is made by the instruction."[2] The committee reported that the persistence of the assembly "evidently shows that their desire is to assume to themselves the executive power of the government of the said Province, and has a direct tendency to throw off their dependence upon Great Britain, which is so necessary to be maintained even for their own preservation," a notable insight into the essential character of the dispute.

Another check, moreover, was received from the agent of the province in London. Wilks had written on October 23, 1732, that he had been having conversation with several distinguished persons, friendly to Massachusetts, including the Lord President of the Council, and that they all thought the province in the wrong on this matter. It was his advice that the province

[1] Palfrey, IV, 545, note.

[2] Acts and Resolves, II. 702.

address the king for relief from the ill consequences of such a procedure as the instruction required, rather than insist too strongly on the right. He seemed to fear a possible untoward result from too great obstinacy. "I with great submission offer my thoughts that it would be most wise and prudent for the General Court to settle the matter without its being brought into a dispute with the Crown on this side than afterwards to comply." Belcher used this to intimate to the general court a possibility that the deplorable undefended state of the province, due to the lack of money which the general court should supply, might lead to the king's "taking the necessary care for supporting his forts and garrisons as well as every other part of his government." In other words, if the house insisted on too much, it might lose every part of its control over the executive. As usual, Massachusetts stopped just short of the danger line.

Now that all hope of the withdrawal of the instruction was gone, the house must choose between a compliance therewith and a further continuance of an intolerable situation. The treasury had now been empty for more than two years, and the debts of the province amounted to tens of thousands of pounds. The province could pay and wished to pay its debts, and repeatedly passed bills of supply sufficient therefor, but the governor was unwilling to allow it to pay its debts except in this form obnoxious to the house. It became evident that the governor would not yield, and it was not the governor but the undefended province that was suffering from a continuance of the quarrel. The result was the passage at last, in October, 1733, of an act granting a supply of £76,500, from which was omitted the long protested clause that would have restricted its issue to warrants passed by the house.[1] It was accompanied by a long message, in which the house protested against the reception of this action as a precedent in prejudice of their right. Since there had been no general supply since September, 1730[2] (over three years), "considering that great distress and difficulty are like to rise from an empty treasury," the representatives, "out of their great zeal for his Majesty's honor and service and their earnest desire to preserve the public peace and quiet of the government, to discharge the debts and to render to everyone their just due, have

[1] Act 1733-4, c. 7.

[2] Act 1730, c. 3.

judged it more convenient to suspend the exercise of their right of examining accounts before payment in the present supply." They declare their continued belief, nevertheless, "that the royal charter doth empower the General Court to reserve to themselves [in the act for supply] the examination of accounts and in it to direct that money be paid out of the Treasury for the discharge of such accounts only of service performed as are allowed by the whole court," "leaving the exercise thereof to be assumed by any future Assembly."

The house was defeated, but not routed. The concessions yielded to them in the instruction were realized to the full, and broadly construed. The right of the house was retained, to audit the treasurer's accounts after payment and to complain of grievances in the warrants passed by the council; and considering that the treasurer was elected by joint ballot, in which the house was predominant, here was a substantial guaranty against oppression. It was true, as the house complained, that the passage of accounts by the council would require only four favorable votes, a mere majority of a quorum of seven, whom the governor might choose out of the twenty-eight members. But experience gave no reason to fear corruption, or application of money contrary to the laws, which were still the limit of the council's discretion; and there was always the political control annually exercised in the election by the general court, so that the governor's supposed four corrupt appropriators of the revenue could easily be dropped out by the house at the next election.

But far more significant was the use now made (and henceforth in all supply acts) of the clause in the instruction which allowed "one or more clauses of appropriation." For example, the act of 1733[1] granted to the king £76,500 "for the necessary defence and support of this government, and for the protection and preservation of the inhabitants thereof," in thirteen items, whose funds were non-transferable, and which were remarkable for their extremely detailed provision, adopted apparently to exclude expansion at the council's discretion, viz. (1) £8,162: 12s. for wages and support of the Castle garrison" "and no other use whatsoever," the number of officers of each rank and of soldiers being specified; seven other items of the same sort, for the "coun-

[1] Acts and Resolves, II. 690.

try sloop" and six enumerated forts; (9) £26,589:6s. for "grants made by this court, and stipends established by law, and nothing else;" (10) £15,063:4s. for debts of the province "to persons who have served them by order of this court, in such matters and things where there is no establishment; and also for paper, printing and writing for this court, the expenses of committees, public entertainments, the entertainment of Indians and presents made them," the governor's visit to Saco, Province House repairs, indents, surgeons' accounts, supplying the forts with wood, Court House repairs, expresses, expense of a council committee to Rhode Island, repairing the Light House boat, treasurer's disbursements for forts, truck-houses, and the sloop in the country's service, and surveying new towns; (11) £6500 for wages of the representatives; (12) £2500 for wages of councillors; and (13) £1000 for "contingent and unforeseen charges that demand prompt payment." That is to say, as a result of this conflict, the house had lost its usurped right to audit muster rolls, which was little more than a form; but on the other hand it had allowed the council to issue warrants only within precise, narrow limits for detailed purposes, thus turning into a mere form the warrant power derived to the council by the charter.

Such was the system of financial control in the province, a wide departure from the evident intention of the charter, but the natural result of a half-century of competition between two bodies, of which one must remain on the defensive, the other might use its great original power to make an active campaign and win additional powers. It was the house, then, that held the purse of the province, raising the public money by taxation-laws matured in its own wisdom, subject to the concurrence of council and governor; spending the public money for purposes which were determined in full outline by itself, and in detail by a body politically dependent upon it; finally, auditing the accounts of the expenditure, thereby completing a process in every step of which the people's money was virtually under the control of the people's representatives.

CHAPTER VII. CONTROL OF MILITARY AND DIPLOMATIC AFFAIRS.

One of the most vital functions of colony government was defence, and the dispute between royal and popular sovereignty, or at least the struggle for practical control, extended not unnaturally to this important field. Colonial experience had accustomed Massachusetts to control of all military matters directly or indirectly by the popular will;[1] including regulation by law of the general court, appointment of officers by the court of election or the general court, and supreme command by the popularly elected governor and assistants. The normal provincial government on the other hand, quite as much as a matter of course gave this control to the governor, the agent of the crown, and his appointees.[2] In the general compromise between the two systems, embodied in the second charter, military functions were divided between the two powers. The governor as commander in chief was the military head of the province; but the power of the purse, and the right to make laws (including militia and military laws) belonged to the assembly, and these powers tended to expand till they involved in a considerable degree the power of the sword, so dependent on the power of the purse in days when the support of soldiers and the building of fortifications must be financed largely by direct taxes, whose burden was very keenly felt.

As in the colony days, the system of defence was essentially a militia system depending on the assize of arms, with universal obligation to service, rather than a military system depending on a standing army; and the approximation to the latter which was necessitated by the French and Indian wars was regarded as temporary, resting as at home on annual acts, that the subjection of the military to the civil power might be ensured. Thus the matter naturally became one phase of the tendency to subordination of the executive to the legislative power.

[1] Osgood, The American Colonies, I. 521.

[2] Ibid. II. 378.

By the charter the governor received "full power . . . to train . . . and govern the militia . . . and for special defence . . . to put in warlike posture the inhabitants . . . to lead them . . . to encounter . . . destroy and conquer . . . all . . . such . . . persons as . . . attempt . . . the destruction . . . or annoyance of our said Province . . . to . . . exercise the law martial in time of actual war and also . . . to erect forts . . . and the same to furnish with all necessary ammunition, provisions and stores of war."[1] Yet the whole militia system rested on a law of the province, passed by the assembly and assented to by the governor in 1693, which went into great detail regarding the liability to service, the arms required, the view of arms, the frequency of trainings, the manner of appointment of officers,— all practically a continuation of the colony system.[2] This was supplemented by a law of 1697,[3] empowering officers to pursue the enemy, providing for calling their regiments together on alarm, enjoining obedience to superiors. The principal innovations of the provincial system were that appointment of commission officers was to be no longer by the general court, nor even by the governor and council, but by the governor alone; and that while the command of the forces was still in the governor, that officer was now a royal, not a colonial, functionary, control thus being exercised from above, no longer from below.

The embodiment and organization of the military forces on a war footing was a different matter. The supreme command was in the governor by virtue of the charter, and the governor in this respect might be viewed from above as a part of the imperial military system commanding the English forces of Massachusetts, as well as from below, as the military head of the colony organized for self-defence. Ideally, for the sake of the military dependence of the colonies, the former aspect should have been emphasized, the governor defending the colony by means of imperial troops paid and directed from home, to whose support the colony would contribute proportionately, but indirectly through the British treasury. Bellomont saw this point, and was in theory opposed to the colony's defending itself, seeing that the

[1] Acts and Resolves, I. 18.

[2] Act 1693-4, c. 3.

[3] Act 1697, c. 1.

independent spirit of colonial self-sufficiency would be fostered by the consciousness that its defence depended upon itself without the help of the home government. But whatever the imperial ideal, the actual fact was that the colony defended itself, raised its own troops, regulated them by its own laws, paid them wages and supported them, and only incidentally used the governor as commander in chief.

Not only the command of the troops but also the appointment of military officers, was in the hands of the governor, and this latter act was one of the very few which he might perform without the advice and consent of the council. It was his peculiar function, and the house made no encroachment upon it, except in the misunderstanding under Shute and Dummer, when on several occasions interference by the house took the form of desiring the governor to remove an officer for alleged dereliction of duty.

Forces were organized in accordance with acts of the general court, and the means used to keep control of the army and ensure subordination of the military to the civil power was the familiar English one of annual acts. The establishment of military discipline and the authorization of courts martial for enforcing it, depended on acts passed with a time limitation, usually one year, which were omitted in time of peace. The first one was passed in 1700;[1] hence it is to be inferred that until that date this had been a power uncontrolled in the hands of the governor and assistants, who were still regarded as a popular body. A precise definition of crimes in this jurisdiction was not made until 1704,[2] when penalties were assigned by an act of the court, which left a good deal of discretion to the commission officers, but safeguarded the rights of the individual before the court martial.

There was a considerable body of legislation of much the same nature, upon which the efficient prosecution of a war depended, which was at first passed in the form of annual acts, sometimes even for a shorter period. It was omitted in time of peace.[3] These acts (1) offered bounties for Indian scalps or captives; (2)

[1] Act 1699-0, c. 21.

[2] Act 1704-5, c. 7.

[3] In Dummer's time the legislation was passed to continue in force during the war, this laxness being made endurable by the control the house was then enjoying over the passage of muster rolls.

forbade desertion of the frontiers by the inhabitants of the towns, except under license;[1] (3) permitted the governor and council to transport the militia out of the province for the defence of neighboring colonies;[2] (forbade arrest of *bona fide* soldiers for debt;[3] (5) provided for levying soldiers, described the method of impressment, time during which pay should run, etc.;[4] (6) prescribed the procedure in issuing supplies and pay.[5] By making these acts temporary, and of no force in time of peace, the practical result was secured that the power of making peace and war was in the general court, since no war could be carried on (beyond the mere rendezvous on sudden alarm) without these acts, and for their passage a general court was necessary; and by means hereafter to be described the passage of these acts might be made the price paid for yielding to the general court a considerable measure of control over the troops thus authorized.

Almost from the very first, the pay of officers and soldiers was fixed by the general court. Until 1696, it must have been by the governor and council; for there is no mention of the matter among the acts and resolves of the court. Presumably the old scale of wages customary in the colony was continued without question, the governor and council merely supervising the automatic application of that law to the muster rolls of garrisons and companies of soldiers. But with the change in the value of money consequent upon the issue of credit bills in 1690, and with the more frequent calls for soldiers in King William's wars and the additional inducements required to be offered to soldiers enlisting, some change soon became necessary, and considering the jealous regard of the house for the appropriating function it was to be expected that so large an item as soldiers' wages and subsistence would be brought under the control of the body claiming the right to dispose of the people's money. In 1694 a bill establishing a detailed schedule of pay for privates and officers, and rates of subsistence, was passed by the house and concurred in by the council. The bill failed to pass, however, owing probably to the opposition of the lieutenant-governor, in defence of what

[1] E. g., Act 1694, c. 25.
[2] E. g., Act 1694, c. 11.
[3] E. g., Act 1704–5, c. 10.
[4] E. g., Act 1693, c. 9.
[5] E. g., Act 1703-4, c. 7.

he regarded as his military prerogatives.[1] Substantially the same bill came up in 1696 and was passed, the occasion having been the dispute on the pay of Captain Church's men, who, relying on the promise of the council, expected more pay than the house was willing to give.[2] From now on the establishment of wages was a recognized function of the general court. The resolve of 1696 was to continue in force only twelve months, but none was passed at its expiration, and it was presumably followed as the "customary wages" until further positive action should be taken. Dudley seems to have regarded this, as he did all action of the house in military affairs, as mere advice; and while he might or might not follow their advice in other matters, he was careful to follow it in such an affair, where by refusing to pass supplies they could thwart him. He would be especially ready to follow their advice here, as the soldiers' pay was a thing which it would be the interest of the house to keep up to the highest point demanded by efficiency in enlistment. So in 1703-4, when the house passed a new establishment,[3] though there is no evidence that the council and governor took final legislative action upon it to make it a resolve, yet it was followed as authoritative in the passing of muster rolls.

As a matter of course, bounties and special gratuities to soldiers were originated by the house, being in addition to the "accustomed" or legal wages.

The passage of muster rolls (1721-1730) was a species of double control exercised by the house over the pay of soldiers, ostensibly in order to assure itself that the pay was delivered according to law; actually in order to give the house an opportunity to condemn a policy already carried out, that the governor might in future avoid policies displeasing to the house. (Chapter VI.)

Direction of military affairs is naturally an executive function. In the colonial period the movement of troops and the assignment of garrisons had been the function of the governor and assistants, efficiency and definiteness of responsibility being thus gained without sacrifice of liberty or of civil supremacy over the military; for the assistants were primarily a civil body, and the councils of war which assisted them on occasion were elected by the general court, which defined their functions and

[1] Acts and Resolves, VII. 534.

[2] Resolve 1696–7, c. 56.

[3] Resolve 1703-4, c. 76.

absolutely controlled them. The language of the provincial charter was plainly in favor of the royal governor as the director of military affairs. He it was who should "assemble in martial array and put in warlike posture the inhabitants, lead and conduct them to encounter, expulse, repel, resist, and pursue by force of arms" persons enterprising the destruction or annoyance of the province. In words the house acknowledged this; nevertheless, in actual practice the first forty years of the province was a period of continual encroachment by the house upon the governor's prerogative — a prolonged effort, by the use of the power of the purse, to grasp that of the sword. It will be convenient to consider first the forms of this increasing participation of the house in military affairs, secondly the means by which this encroachment was made, and thirdly the situation in Shute's administration, at the climax of encroachment.

From the very earliest times the governor was accustomed to receive the *advice* of the house on these matters. Not a small number of the members were militia officers, and the localized representative system brought men together, with intimate knowledge of the military situation, from all parts of the province, even from the frontiers; so that its advice was peculiarly valuable for the common cause of defence. Not unnaturally, then, the custom grew up under Phips and Stoughton, both of whom had been trained under the old system, of regarding representatives and assistants together as one grand council of war, to which should be referred intelligence from the seat of war and correspondence with the other colonies, and from which should be expected the maturing of plans based on the local knowledge at its disposal. But the line was difficult to draw between this valued advice, and actual command, or the authoritative responsible direction, which undoubtedly belonged to the governor alone. The governor at all times regarded the expression of the will of the house upon military matters as mere advice which he might or might not follow. Dudley not infrequently told the house as much, but so long as he actually followed the advice, he was giving strength to a line of precedents which it became more and more difficult to break. Gradually, in the first two decades of the provincial period, the house got into the habit of (1) assigning periodically the numbers of soldiers who should be posted at the various garrisons and forts; (2) detailing the

plans of campaign, determining to what places bodies of troops should be sent, and the number of men of whom they should be composed. In 1723, in fact, the house made an attempt to have a joint committee appointed, to sit during the recess and conduct the war. Naturally the council non-concurred, and that was the end of the effort. But the attempt to assign troops to garrisons and expeditions could be more easily justified from the superior local knowledge of the representatives, and at least on one occasion, September 8, 1721, Governor Shute of his own motion invited it. Such dispositions were made nominally by the governor, the house "desiring his Excellency to give orders" thus and so. But for all practical purposes the will of the house was law to the governor.

The control of the purse was the means used by the house to secure this power. Expeditions might be determined upon by the executive, the number of soldiers needed at the garrisons might be decided by his discretion; but the expedition could not be undertaken, nor the garrison maintained, without provision for pay and subsistence. The right to vote pay and subsistence was the weapon of the house, and it was used with its whole weight. If the determination of the governor as to military policy was contrary to that of the house, pay and subsistence could be refused and the governor would be powerless. On emergencies the governor would call out the militia to answer an alarm, and then expect the assembly, by whose tacit consent he had done so, to support the soldiers; but no active exertion of force such as an expedition against the enemy's position, and no permanent military expenditures such as those entailed by the maintenance of garrisons, could be made contrary to the will of the house. It is true, the actual conduct of military affairs was largely by the governor, because, as being a single functionary, in whom responsibility could be concentrated, he was the most suitable agent of the house, according to the familiar necessity in military operations; but it was as agent of the house that he acted, not of his own right and prerogative, and in the last resort decisions had to be made by the house, for the reasons already stated.

Even in his action as agent of the house he was limited in ways that must have been vexatious. For example, to limit the size of parties he might send out, it was sometimes provided in the resolve allowing pay that the pay of no officer above the

rank of sergeant or captain, should be allowed by authority of this resolve.[1]

The same principle applied in the control of defensive forces in garrison. If the house was of opinion that a certain post maintained by the governor was unnecessary or not of sufficient utility, it would declare its pleasure that the pay of that garrison be stopped. The matter came to an issue under Dummer in 1723, immediately after Shute's departure. He reproved the house for its attempt to assume the military power of the executive in presuming to "draw off the forces;" whereupon the house answered him that it meant not to "draw off the forces," which was the function of the commander in chief, but only to "draw off the pay and subsistence of the forces,[2] a difference which deceived neither the house nor the lieutenant-governor, but which illustrates the friction necessarily resulting from the governor's nominal exercise of a military power that was practically controlled by the house.

Out of the practice of examining intelligence from the frontier, it progressed to desiring to examine the journals of the commanders of expeditions, and later, after continued ill-success in this encroachment in Shute's time, to requiring them to keep separate journals for the perusal of the house, besides their usual reports to the governor as military superior.[3] The governor's instructions to officers it attempted to bring under its own examination as well, that it might make sure of his compliance with its recommendations, but here it gained little success. The power of the purse was difficult to apply for such a purpose; for it was obviously unjust to stop the pay of officers and men after they had performed service, merely for the reason that the governor's instructions to them were contrary to the desire of the house, and it was difficult to compel the governor to divulge his correspondence with officers. In case the house suspected irregularities in the conduct of officers it might (as it did in the case of Woodsides in 1727, and others) stop their pay for some time, while it conducted its own investigation. Such a procedure must have weakened discipline, since officers and men would see that obedience to military superiors was not the most sure method

[1] E. g., September 20, 1723.

[2] Court Records, XI. 479.

[3] Act 1722-3, c. 12, § 11.

of advancing their interest; and the entrance of politics into the militia had its natural result in the insubordination common and evident in the later intercolonial wars. The same would be the result of such experiences as that of Major Moodey in 1722, who was apparently persecuted by the house because of the personal jealousies of the members.[1]

In 1722 a keen dispute[2] arose over the house sending a committee to see the militia of the eastern counties paraded. It could only be done by the governor's order, which in this case was apparently given without full understanding of the purpose of the house (viz., to investigate the causes of the desertions then so prevalent,— probably a cover for the attempt to discover the reason why the soldiers were dissatisfied with their officers). Such irregular investigations also must have weakened the ordinary methods of discipline and the responsibility of military superiors.

The stores of war would be expected to be subject to the control of the military head of the province; and yet the house more and more participated in this function. As it was an "affair of money," since the house had to buy the stores, it proceeded to dispose of them, either through committees or by resolves directly commanding its officers, the treasurer, or the war commissioners, to send the stores in such and such quantities to such and such places.

A question long argued between the governor and house was the building of fortifications, but it was rather the expediency of particular fortifications that they were arguing than the right to control. By charter, the governor was given the power to erect fortifications. But the costliness of such public works meant that they were impossible without the willing co-operation of the appropriating power, and the result was the absolute control of this branch of military policy by the house. It was the assembly, which, on the advice of the governor, determined where and when forts should be built and contributions made to assist towns in their own defence; also in some degree, how the money granted should be spent. Thus we find the general court devoting much time and attention to the reconstruction and repeated repair of the Castle in Boston harbor, building forts from time

[1] Court Records, XI. 397, ff.

[2] Hutchinson, II. 253, 258, 259.

to time on the expanding frontier, refusing the insistent demand of Dudley under instruction from the home government that Pemaquid Fort be rebuilt and maintained, but later under Belcher repairing and maintaining it, when the growth of population in that direction had made it expedient in the eyes of the court.

The climax of the encroachment by the house in military affairs was reached under Shute in the early twenties. On account of his inefficiency as compared with Dudley the house was led for the sake of the defence of the province to take a more active part, and it then made use of the forms of interference above described. Shute went home in disgust, January 1, 1723, and laid his case before the king on August 22. A considerable portion of his memorial was devoted to other matters, as the invasion of the king's forest rights, the speakership and adjournment controversies; but his five complaints against military encroachments by the house are worth glancing at here for the light they throw upon the situation as it was when he left it. They were as follows:

1. Voting a committee June 13, 1722, to take account of stores at the Castle, without the permission of the governor.

2. Ordering the treasurer to pay no more subsistence money to the Winter Harbor garrison, but to send the stores which were there to Boston. Later, Shute remarks, the house ordered the place re-enforced on petition of Marblehead that it was necessary for defence, showing that his judgment had been correct. The house, he says, did not like the commander.

3. Voting that Major Moodey be suspended, and refusing his pay, requiring him to attend the court and answer complaints (to the court) of allowing drunkenness and refusing aid to inhabitants, an accusation which Shute asserts (on the word of the officers) to be frivolous, made because Cooke and his party hated Moodey. He adds that the refusal of pay by the house is of no force, being non-concurred by the council.

4. Mustering the militia before a committee of their own, November 17, 1722, to inquire about the causes of desertion. In violation of his order that the report be made to him as Captain-general, it was made to the house.

5. Disposing of the forces, e. g. a resolve November 20, 1722, continuing in service only 40 of the 108 men in Hampshire County, though "His Excellency" was to be "desired to express his orders accordingly."

By this memorial the whole business was brought to light before the English colonial authorities. The house sent an agency of its own (council non-concurring), and, ignoring the charter power, made its defence on the broad ground that Shute was not conducting the defence according to its will, that he had kept the house in a long vacation during the war, which he then conducted as he liked, the house finding afterward that the expedition they planned and provided for had not been undertaken.

Shute returned to the attack with a second memorial, March 5, 1724, complaining of the house for prescribing the rules which it was for the council to give, paying no forces without seeing by the muster rolls that their orders were complied with, extending their encroachments to the care of the Castle, assuming in January, 1723, to draw off the militia from the west, for which they had been reprimanded by the lieutenant-governor.

So numerous were the complaints against Massachusetts at this time, so great seemed the danger to their charter (it was at this time that the Explanatory Charter was granted, settling the speakership and adjournment controversies), so uniform were the disapproving views of the conduct of Massachusetts which were held by the privy council, that upon this matter the agents deemed it wise to bend to the storm, since it here involved no practical loss of power, but only a reduction of the extra-legal pretensions of the house. The agents replied that the house "had never pretended to subject the militia of the Province to their orders, knowing that power to be in the Commander in Chief;" muster rolls are brought to set forth that the officers and soldiers have done their duty according to the laws passed and approved in England, not to "discover whether the orders [of the house] are complied with." This was about as ingenuous as the plea of the house to the lieutenant-governor that it only meant to "draw off pay and subsistence;" but it was sufficient. The privy council supported Shute, declaring that he had "acted with great zeal and fidelity," and charged the agents to stop the encroachments of the house on the employment of troops. But no measures were taken to stop that encroachment, and in the ways and for the reasons above described the house continued to use its control of the purse to secure practically complete control of the sword as well. This system, which we have seen develop in the early part of the provincial period, Chalmers found still in operation in the

last intercolonial war, which was, as he says, "conducted by Committees of Assembly."[1]

The conduct of foreign affairs is commonly regarded as preeminently an executive function, from the necessity which exists in connection with it of concentrated responsibility and dispatch. It is the last place in which to look for encroachment by the representative body, except in the way of an indirect influence. Yet we find the Massachusetts house claiming its share even in this department, and in some degree exercising direct control, certainly to a degree at times which divided the governor's responsibility, if it did not entirely relieve him. The colony was concerned with two sorts of problems, intercolonial affairs and relations with the French and Indians. whether hostile or submissive.

The former was not an affair of much consequence in the history of the relations between executive and legislature. It was the understood thing on all hands that the court (the governor, council, and house concurring) was the proper organ of the province for representing it in dealings with other colonies or provinces. The governor was the convenient intermediary for carrying on correspondence with other governors, but final action of the province in intercolonial relations required the formal sanction of the general court (tacitly given to preliminary negotiations), expressed in an act or resolve.

Boundary settlements, the most copious source of intercolonial disputes, were conducted by commissioners named and instructed by the general court. The correspondence connected therewith was carried on by the whole court, which framed and adopted plans of accommodation, sending letters in the name of the province, passed as resolves. This practice was common among the provinces.[2]

Minor disputes also, such as concerned intercolonial impost or tonnage duties,[3] were the subject of action by the whole court.

Arrangements for defence as a matter for intercolonial co-operation lay on the border line between these matters of corporate colonial action, requiring the expression of the will of the province by its legislature, and the military affairs which the governor claimed to control Thus the correspondence was usu-

[1] Chalmers, Revolt, II. 300, 301.

[2] Greene, Provincial Governor, 192.

[3] E. g., Resolve 1701-2, c. 31.

ally carried on by the governor acting in close communication with the two houses. He acted really as the spokesman of the house and council, and sometimes the letters themselves were written by the general court. For example, in 1694-5 Lieutenant-governor Stoughton carried on a long correspondence with Connecticut, requesting the co-operation of that colony in the defence of Deerfield and the Connecticut River region, in which correspondence one letter[1] was "by command of the Lt.-Gov., Council and Assembly;" and in 1696 the general court voted[2] that an application be made to Connecticut and Rhode Island for help in the war, the house naming one of the commissioners for carrying on the negotiation, and expecting the governor and council to name the other. Also in refusing the quota of Massachusetts for the defence of New York, recommended by the home government and requested by Fletcher, Stoughton was glad to fortify himself behind the resolves of the court,[3] which declared that, "we humbly offer" that the assistance cannot conveniently be rendered. The obvious reason for this participation of the house in the latter case was the fact that the New York proposition involved the spending of money, which the house could refuse. In the former case the participation of the general court in the application for aid gave the additional force that the request was backed by a colony's opinion as well as a royal governor's requisition, and hence would be more agreeable and have greater likelihood of success.

The conduct of Indian affairs was a more delicate affair between governor and house, involved so closely as it was with the conduct of military affairs. In the colonial period this had been a function of the governor and assistants, acting in close communication with the deputies; that is, the business had been entirely in colonial hands. But the provincial governor represented an entirely different principle. It was still very desirable that the conduct of Indian affairs be in the executive, where prompt action could be taken and strict responsibility secured, but with a changed basis for the governorship that would mean that its control had passed from the popular to the prerogative body. Was it to be an Indian policy according to Massa-

[1] Resolve 1694-5, c. 62.

[2] Resolve 1696-7, c. 76.

[3] Resolves 1695-6, cc. 29, 38.

chusetts notions, or one framed on imperial lines, with ideals perhaps entirely different?

The governor had certain points in his favor. It was the practice among the other provinces that treaties should be made by the governor, from the analogy with the chief of the executive in the home government, from his general power to act in matters not otherwise provided for by the charter and instructions, and from his instruction to maintain a good correspondence with the Indians.[1] The necessity of correspondence with other provinces also, in which the governor alone was the diplomatic organ, favored the claim of the governor of Massachusetts to this function. This unification, this imperializing of the Indian problem, was naturally urged in consequence of the manifest advantage enjoyed by the governor of Canada in the long conflict between New France and New England, through his ability to speak for all New France in negotiations, whether in offering conciliatory propositions or in making threats, while the resources of the English colonies were at the command of so many colonies, having perhaps divergent interests. Some recognition of this principle was found in the practice of appointing one governor for two or more provinces (e. g., Dudley for Massachusetts and New Hampshire, Bellomont for New York, New Jersey, Massachusetts, and New Hampshire). In this way the unified action of the two or more colonies was secured in a measure by identity of executives. How much better if those executives could speak for their provinces without fear of disavowal by their assemblies. Also in dealing with the Indians the greater impressiveness and influence of a command or offer coming from the Great Father in England speaking through his ambassador, the governor, was obvious, as compared with the conclusions arrived at by an assembly of deputies, some of whom were personally and perhaps familiarly known to the Indian ambassadors.

In the early practice of the province, Indian negotiations were carried on by the governor and council, holding frequent communications with the house. The governor, acting under advice of the council, wrote letters to agents among the Indians or in the frontier towns, received from them reports of their dealings, sometimes himself visited the frontiers and by previous appointment conferred with the chiefs, making treaties of more or

[1] Greene, Provincial Governor, 108.

less formality. The letters which he received he usually sent down after perusal by the council, for the house to read, sometimes on his own initiative, often at the request of the house. Likewise the personal negotiations he usually reported to them in his speeches to the assembly. The advice of the house was frequently forthcoming, was always received in good part, and was often followed, because of its expression of the will of the body whose purse could make war or end it. But the action of the house was only occasional and spasmodic. Joint committees of house and council might concert measures and they would have weight with the governor; representatives of the two houses frequently at his own request accompanied him on the negotiations, to give added dignity to the occasion; but he it was and not they who made the decisions, except in the last resort, where for the decision of war and peace the power of the purse could be made effective. It was too heavy a tool to use in most matters of diplomacy.

Phips and Stoughton were practically at one with house and council in this, as in most other matters. There was therefore no conflict during their administrations. Dudley was very skilful in his dealings with the Indians, and except on one important occasion (the Borland case, 1706) his devotion to the service of the province in a military and diplomatic way was above suspicion. There was for this reason little attempt to limit his discretion, which was generally recognized as wise and efficient. His manner of dealing was exemplified in 1710, when, on February 3, he communicated to the council certain letters about dealing with the Indians through a Norridgewock prisoner. By advice of the council it was decided that the Indian be sent, and instructions were drawn up, "and the said letters and instructions sent down to the Representatives for their perusal, which were returned with their approbation by a message." Dudley would keep the house informed what he was doing with the Indians, but it was for their *perusal* that he sent the papers; their validity was not dependent on the approbation of the house, for the next day a change was made in the instructions, and no mention is made of its being communicated to the representatives.

In Shute's administration the house took a higher stand, assuming an aggrieved tone in regard to Indian negotiations which

were not carried on according to their plans. We even find a declaration of war with the Indians the occasion of action by the house. On August 8, 1722,[1] Shute announced in his speech that by advice of the council he had declared war against the Eastern Indians as rebels and traitors. On August 10 the house sent an address to Shute declaring that they thought the governor and council had sufficient reason to declare the Indians rebels, and agreeing to the prosecution of a vigorous war.

In 1721-2 a strong effort was made to engage the Iroquois in offensive alliance against the Eastern Indians. On September 9, 1721, the council sent a message desiring to "know if the house design to join in the care of sending the present to the Five Nations or whether they will leave it to the Board." On November 13 the representatives replied. Referring to the present of £500, which was recommended at the last session, it says: "altho the House was not then advised with in any respect concerning the disposal of the aforesaid present, as they justly expected to have been, nor gave any order therefor, yet they think it requisite that they be now informed" who were the commissioners, how they were instructed, what they accomplished. A message was sent down with the papers, giving an account of the transaction.

Later, in 1722, the house made an advance. In response to the proposition of a joint committee,[2] on August 19, that a present of £500 be sent to the Indians by commissioners, and that his Excellency be desired to write to the governor of New York to promote the affair, the house non-concurred, but proposed[3] on August 16 a present of £1000, the treaty to be in this province, commissioners to "be appointed by this court," and his Excellency to be desired to be present. That is, the house tried to assume the leading part. The council unanimously non-concurred, but it practically was the program of the house that was carried out in November. The place of the conference was fixed in Boston, not "at Deerfield or elsewhere in Hampshire as His Excellency shall think proper." On November 22 the house expressed[4] its desire that what was to be proposed to the delegates of the Indians at their dismissal be prepared by the whole court. The governor's

[1] Court Records, XI. 380.
[2] Ibid, 383.
[3] Ibid, 393.
[4] Ibid, 414.

speech was sent down to the house, which replied that "they being concerned in the speech now proposed to be delivered to the delegates of the Six Nations, cannot consent to the same as it is now drafted unless where the word 'I' is it be added in the name of the General Court and that the House be present when it is delivered." The house had its way.

The same direct control was maintained by the house during Dummer's administration, 1723-1728. Their position was recognized in a vote of the council on June 25, 1723,[1] (with which, of course, the house concurred), that his Honor "be desired to have the assembly sitting when any overtures of a pacification with the Eastern Indians come under consideration."

For negotiations with Indians, hostile or friendly, commissioners were appointed by the whole court and their instructions were passed concurrently.[2] This was insisted on in form even when the action was really taken by the lieutenant-governor and council. For example, in June, 1725, both houses accepted the report[3] of a joint committee that his Honor "by the advice of this court appoint" two commissioners. The house sent word that it was ready to make the appointment in conjunction with the board. Dummer sent word to the house, however, "that agreeable to the advice of the court he had appointed Col. Tailer and Col. Stoddard to go upon the message Eastward, that he had communicated the same to the Board and it is acceptable to them, and that he now communicates it to the House, not doubting but it will be acceptable to them also." On the question, "Whether the advice of the Court had been had in appointing and sending down two gentlemen to the Eastward which His Honor has nominated for that service," the house voted in the negative, and it was then voted concurrently "that His Honor the Lieutenant-Governor be desired to appoint" the same two men, by which procedure the house gained a barren precedent and nothing more.

In late August and early September of 1723 a body of delegates from the Six Nations came to Boston. By the general court, "Heads for the Conferences" were drawn up and accepted, the Lieutenant-governor was "desired to speak to them in the name of the Court" and that "Mr. Speaker and the Committee [of

[1] Court Records, XI. 569.

[2] Court Records, XII. 20, 32, 180, 330. August, 1723, June, Dec., 1724.

[3] Ibid, 421.

the two houses jointly] be of advice to His Honor more immediately upon any emergency." On six different days conferences were held between the delegates and the Lieutenant-governor, the whole court being present. Answers to proposals of the delegates were digested by a joint committee and accepted by the whole court, and the minutes of the conferences were signed by the speaker for the house, by the secretary for the council, and by the lieutenant-governor.[1]

A dispute arose on the conclusion of this conference as to the proper seal to be affixed.[2] The lieutenant-governor's private seal having been placed on a belt of wampum presented to the delegates, the house resolved that it be defaced and that the seal of the province be affixed. The council non-concurred, and desired the house to withdraw the resolution, the governor being keeper of the seal. But the house declared that "the affixing a private seal contrary to the agreement of a committee was a high affront and indignity to them." They later justified themselves on the ground that less authority in the eyes of the French and Indians would attach to a treaty bearing the private seal of the lieutenant-governor than to one with the seal of the province, and said that it was for this reason, and not out of disrespect to the lieutenant-governor that they had entered this protest.[3]

At the end of 1725 there was a conference of Eastern Indian delegates at Boston for concluding a general pacification. On November 11 Dummer sent word to the house that the Indian delegates were present and that if the house or any of them should incline to be present it would be acceptable.[4] Upon the house asking whether this was "to be of advice or spectators only," Dummer replied that the making of war or peace with the Indians belonged to the lieutenant-governor with the advice of the council, by the 77th instruction, but that he would be ready on occasion to receive the advice of the house of representatives. The next day the house declared its "earnest desire" to proceed in the same method as in the treaty with the Six Nations in 1723. Dummer found "a great difference" between the two cases, the treaty in 1723 being with his Majesty's subjects, friends of this govern-

[1] Court Records, XII. 29-54, *passim.*
[2] Hutchinson, II. 269, 270.
[3] Court Records, XII. 50.
[4] Court Records, XIII. 11.

ment and always at peace with us, the design of the treaty being to obtain assistance, (as it were, an inter-colonial affair); "whereas the Eastern Indians are His Majesty's enemies and in a state of rebellion and now sueing for peace. In the mean time I am very desirous that both Houses should be present at the conference." On the 12th of November a conference was held "between His Honour the Lieutenant-Governor and the Indian delegates in the Council Chamber, the two houses being present."[1] On November 15 Dummer informed the house that he had commissioned several gentlement to treat with the Indians, including the speaker and two other members of the house, and though the house asserted its earnest desire that "the whole Court, who are the grand Council of the Province may be of advice to His Honour" as is usual and not "inconsistent with His Honour's undoubted power to make peace or war," yet the lieutenant-governor would only say that he should "always be ready to receive" the advice of the house. Regarding the method of treating by commissioners as "more agreeable to the method of former treaties than to have the whole Court present . . . as well as upon many other accounts more proper and convenient" he held no more conferences in the presence of the whole court, but conducted the negotiation through commissioners, who were, however, instructed by the concurrent action of the two houses. The treaty, when negotiated, was agreed to by the two houses with some alteration by mutual accommodation, and on December 15 "in presence of the whole Court the pacification was completed and signed."[2] At the exchange of ratifications in the following July the lieutenant-governor was accompanied to the eastward by a quorum of the council, and at his suggestion by ten of the representatives, appointed by them for the purpose.

The regulation of Indian affairs in time of peace was assumed entirely by the general court. They were regarded as subjects of the king, in an extraordinary condition it is true, but under the legislative power of the province, like any other class of inhabitants. But there was also a special reason for their affairs being attended to by the general court rather than by the governor and council. The system of truck-houses at frontier posts, where the trade with the Indians (now the chief concern of the white in his relation with the redskin) was carried on by public officers, elected

[1] Court Records, XIII. 16.

[2] Ibid, 81.

by the court, was supported from funds appropriated by the general court, and as being "an affair of money" was peculiarly subject to the influence of the house.

Thus the house is found playing a part in the fields of military and diplomatic policy, far beyond what was contemplated in the charter, but subject to very substantial limitations. It wages war, advising and sometimes dictating the precise course to be followed by the executive. It is enabled to gain this control over the governor by the fact that it possesses the sinews of war, which it may grant or withhold. The more delicate process of diplomacy is not so immediately subject to the application of this heavy tool, and here the governor enjoys a considerable degree of independent discretion. But his independence is largely a matter of immediate convenience to the house, which can not of itself conveniently perform executive functions. His seemingly independent action in always conditioned by the necessity of the tacit consent of the house; for if he neglects this he will be brought sooner or later to recognize that the body of government that holds the purse-string holds the essentials of sovereignty.

APPENDIX.

I. Educational Institutions Attended by the Author.

Waterville (Maine) High School, 1890-1894.

Coburn Classical Institute, 1894-1895.

Colby College, 1895-1899.

Columbia University, 1900-1903.

II. Degrees and Appointments.

A. B., Colby College, 1899.

A. M., Columbia University, 1901.

Instructor, Coburn Classical Institute, 1899-1900.

University Fellow in American History, Columbia University, 1902-1903.

Instructor in American History and Political Science, Ohio State University, 1903-1905.

Assistant Professor of American History and Political Science, Ohio State University, 1905.